Dec 4 1877
Submitted
5-337

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 113.

LOUIS BERGDOLL AND CHARLES PSOTTA, PLAINTIFFS IN ERROR,

vs.

WILLIAM J. POLLOCK, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED SEPTEMBER 10, 1875.

Dec 6 1877
Affirmed
Chief Jus

SUPREME COURT OF THE UNITED STATES.

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1 . UNITED STATES OF AMERICA,
Eastern District of Pennsylvania:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. Of October sessions, 1874. No. 93.

It is thus contained:

Be it remembered, that on the twenty-second day of December, in the year of our Lord one thousand eight hundred and seventy-four, William McMichael, esq., district attorney for the eastern district of Pennsylvania, comes into court here and presents the petition of William J. Pollock, collector of internal revenue of the United States for the second district, for assessing and collecting taxes for the State of Pennsylvania, for the removal of the cause from the district court for the city and county of Philadelphia, in the State of Pennsylvania, to our said court here, which said petition, being filed, is in the words and of the tenor following, to wit:

2 To the honorable the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit.

Your petitioner, William J. Pollock, respectfully represents that Louis Bergdoll and Charles Psotta have commenced suit against him by summons case in the district court for the city and county of Philadelphia, in the State of Pennsylvania, No. 951, December term, 1874.

That your petitioner is an officer of the United States, appointed under and acting by authority of the act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30, 1864, and acts in addition thereto, and in amendment thereof, to wit, collector of internal revenue of the United States for the second district, for assessing and collecting taxes in the State of Pennsylvania; that the said suit was

3 brought against your said petitioner on account of an act done by him under color of his said office as collector, the said suit having been brought by the said plaintiffs to recover back certain moneys paid by the said plaintiffs to the said William J. Pollock, as collector aforesaid, for tax claimed to be due and owing from the said plaintiffs to the said United States.

Your petitioner therefore prays that the cause may be entered on the docket of your honorable court and proceeded in as in a cause originally commenced therein, and that a writ of certiora'i be issued by the clerk of your honorable court to the said district court for the city and county of Philadelphia, according to the provisions of the act of Congress in such case made and provided.

And he will ever pray, &c.

W. J. POLLOCK.

4 William J. Pollock, the above-named petitioner, being duly sworn according to law, says that the facts set forth in the above petition are true to the best of his knowledge and belief.

W. J. POLLOCK.

Sworn & subscribed before me this 17th day of Dec., 1874.

SAMUEL GAILL.
W. D. CONNOR.

Louis Bergdoll and Charles Psotta, trading as Bergdoll and Psotta, of a plea of trespass on the case, &c.

Whereupon the said plaintiffs, by George W. Thorn and William S. Price, their attorneys, complain:

For that whereas the said defendant heretofore, to wit, on the day next before the commencement of this suit, at the district aforesaid, was indebted to the plaintiffs in the sum of one thousand four hundred and nineteen dollars, for so much money by the said defendant before
9 that time had and received to and for the use of the said plaintiffs; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook and then and there promised the said plaintiffs to pay them the said sum of one thousand four hundred and nineteen dollars, on request; yet the said defendant has disregarded his promise, and, although often requested so to do, has not paid the said sum of money or any part thereof, to the damage of the plaintiffs five thousand dollars.

And, therefore, they bring suit, etc.

GEO. W. THORN,
W'M S. PRICE,
Per S. GORMLEY,
Att'ys for Pl'ffs.

To clerk C. C. of U. S.

Bill of particulars.

Am't of tax paid defendant, under protest, for "defi. beer st'mps"	$1,350 00
" of costs & penalty on same	69 00

(Indorsed:) C. C. of U. S., E. Dis. of Penn'a, No. 93, Oct. sess., 1874. Louis Bergdoll and Charles Psotta, trading as Bergdoll and Psotta, v. William J. Pollock. Narr.

Enter rule on def't to plead in two weeks, or judg't sec. reg.
Feb. 26, '75.

THORN,
PRICE,
Attor'ys for Plai't'ffs.

Clerk C. C. U. S.

Filed 26 February, 1875.

THORN,
PRICE.

10 C. C. U. S., E. D. of P'a. No. 93, Oct. sess., 1871.

BERGDOLL & PSOTTA
vs.
WILLIAM J. POLLOCK.

And the said defendant, by William McMichael, his attorney, comes and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him, and of this he puts himself upon the country, &c.

11 And afterwards, to wit, on the nineteenth day of April, A. D. 1875, a jury being called, come, to wit:

1. John Sickel.
2. Henry C. Trunick.
3. Eugene A. Harmer.
4. Jacob Sterrett.
5. Solomon Fields.
6. Henry B. Pancoast.
7. Myer Troutman.
8. Robert Parke.
9. Henry Pedrick.
10. Edward R. Fell.
11. John W. Pearce.
12. Henry T. Hayes.

Who are respectively sworn and affirmed to try the issue joined, &c.

And now, to wit, this nineteenth day of April, A. D. 1875, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find for the defendant.

12 In the circuit court of the United States, E. D. of Penn'a. Oct. sess., 1874. No. 93.

BERGDOLL & PSOTTA
vs.
POLLOCK.

April 1st, 1875, Mess'r' Gormley, Thorn, and Price, for plaintiffs, move for a new trial and file the following

Reasons for a new trial.

1. The learned judge overruled the offer to prove by Frederick Geissheimer, a witness for plaintiff, that he was a clerk of plaintiffs at their brewery; that plaintiffs were brewers of lager beer only, and that from the date at which the internal-revenue laws of 1866 went into effect until May, 1873, when witness left the employment of plaintiffs, no beer was sold or removed from the plaintiffs' brewery for consumption or sale, except in barrels or parts of barrels, which were all duly stamped with an internal-revenue stamp of the United States of the denomination of one dollar for each barrel, and proportionately for the parts of barrels, as required by the act of Congress in such cases made.

13 To be followed by other evidence showing that all barrels or parts of barrels containing beer and sold at the plaintiffs' brewery, or removed therefrom for consumption or sale, subsequent to the first day of May, 1873, were in like manner stamped.

2. The learned judge overruled the plaintiffs' offer to prove by John Joseph Alter, a witness, that the plaintiffs had made their monthly returns to the collector regularly until and including the month of December, 1873, and that there was no understatement or undervaluation in either of said returns of the quantity of beer brewed or of beer sold or removed from the brewery of the plaintiffs for consumption or sale; and that neither of said several returns was false or fraudulent.

And upon the ninth (9) day of June, A. D. 1875, a new trial is refused, and judgment is ordered upon the verdict.

14 Be it remembered, that in October sessions, A. D. 1874, came Louis Bergdoll and Charles Psotta, trading as Bergdoll & Psotta, in the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, and impleaded William J. Pollock, collector of internal revenue of the United States for the second district of Pennsylvania, of a certain plea of trespass on the case, &c., in which the said plaintiffs declared William J. Pollock, late of the said district, was sum-

moned to answer Louis Bergdoll and Charles Psotta, trading as Bergdoll and Psotta, of a plea of trespass on the case, &c. Whereupon, the said plaintiffs, by George W. Thorn and William S. Price, their attorneys, complain—

For that whereas the said defendant heretofore, to wit, on the day next before the commencement of this suit, at the district aforesaid, was indebted to the plaintiffs in the sum of one thousand four hundred and nineteen dollars, for so much money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district
15 aforesaid, undertook and then and there promised the said plaintiffs to pay them the said sum of one thousand four hundred and nineteen dollars, on request; yet the said defendant has disregarded his promise, and, although often requested so to do, has not paid the said sum of money, or any part thereof, to the damage of the plaintiffs five thousand dollars.

And, therefore, they bring suit, etc.

And the said defendant pleaded; and the said defendant, by William McMichael, his attorney, comes and defends the wrong & injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him, and of this he puts himself upon the country, &c.; and thereupon issue was joined between them.

And afterwards, to wit, at a session of the said circuit court, before the honorable John Cadwalader, judge of the district court of the United States for the eastern district of Pennsylvania, in the third district, then holding said circuit court, on Monday, the nineteenth day of April, A. D. 1875, the aforesaid issue between the said parties came to be tried by a jury, for that purpose duly empanneled.

1. John Sickel.	7. Myers Troutman.
2. Henry C. Trunick.	8. Robert Parke.
3. Eugene A. Harmer.	9. Henry Pedrick.
4. Jacob Sterrett.	10. Edward R. Fell.
16 5. Solomon Fields.	11. John W. Pierce.
6. Henry B. Pancoast.	12. Henry T. Hayer.

At which day came as well the said plaintiffs as the said defendant, by their respective attorneys.

And the jurors, of the jury aforesaid, empannelled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and, upon the trial, the counsel of the said plaintiffs, to maintain the said issue on their part, gave in evidence their certain appeal to the Commissioner of Internal Revenue from his assessment of the said plaintiffs the sum of $1,350, for beer sold or removed without proper stamps to October first, 1873. The said appeal being made on the eighteenth day of February, A. D. 1874, (prout copy of said appeal annexed, see page .)

And a letter of J. W. Douglass, Commissioner of Internal Revenue, to William J. Pollock, collector, dated Washington, Nov. 21st, 1874, disallowing said appeal, (prout copy of the letter annexed, see page .)

And a notice of the collector, defendant, to the plaintiffs, dated
17 Feb. 2nd, 1874, demanding payment of the tax with penalty, amounting to $1,417.50, the said notice being signed "George Turner, dep. collector," (prout copy of said notice annexed, see page .)

And a notice of the collector, defendant, to the plaintiffs, dated Feb. 12, 1874, of a distress levied upon the property of the plaintiffs for said tax, penalty, and costs, amounting to the sum of $1,419.00, (prout copy of said notice annexed, see page .)

And a receipt of the defendant, by John N. Mitchell, dep. collector, to the plaintiffs, dated Feb. 12th, 1874, for the sum of $1,417.50, for said tax and penalty, "paid under protest." (prout copy of said receipt annexed, see page .) And in connection therewith, a notice in writing of the plaintiffs to the defendant, served on defendant at the time said payment was made, dated February 12th, 1874, (prout copy of said notice annexed, see page .)

And an alphabetical list, dated January 22nd, 1874, of persons in the second collection district of Pennsylvania, purporting to be assessed by the Commissioner of Internal Revenue for the ninth of December, 1873; particularly item 407 therein.

"7. Bergdoll & Psotta, 1,350 b'ls beer sold or removed without proper stamps to Oct. 1st, 1873, $1,350."

And the counsel of the plaintiffs, further to maintain the said
18 issue on their part, called as a witness Frederick Giessheimer, who was duly sworn.

The plaintiffs proposed to prove by this witness that he was a clerk of the plaintiffs at their brewery; that plaintiffs were brewers of lager beer only, and that from the date at which the internal-revenue law of 1866 went into effect until May, 1873, when the witness left the employment of the plaintiffs, no beer was sold or removed from the plaintiffs' brewery for consumption or sale except in barrels or parts of barrels, which were all duly stamped with an internal-revenue stamp of the United States of the denomination of one dollar for each barrel, and proportionately for the parts of barrels, as required by the act of Congress in such case made.

To be followed by other evidence showing that all barrels and parts of barrels containing beer, and sold at the plaintiffs' brewery or removed therefrom for consumption or sale subsequently to the first day of May, 1873, were in like manner stamped.

To which offer the counsel of the defendant objected, and the learned judge then an' there sustained the said objection and overruled the said offer of proof on the part of the plaintiffs.

And the counsel of the plaintiffs then and there excepted to the said decision of the learned judge in the premises, and requested him to seal this exception thereto.

19 And the counsel for the plaintiffs, further to maintain the said issue on their part, called as a witness John Joseph Alter, who was duly sworn.

The counsel of the plaintiffs further offered to prove by this witness that the plaintiffs had made their monthly returns to the collector regularly until and including the month of December, 1873, and that there was no understatement or undervaluation in either of said returns of the quantity of beer brewed, or of beer sold or removed from the plaintiffs' brewery for consumption or sale, and that neither of said returns was false or fraudulent.

To the admission of which offer the counsel of the defendant objected; whereupon it was rejected by the court.

To which decision of the court the counsel for the plaintiffs then and there excepted, and requested the learned judge to seal the exception thereto.

And thereupon the aforesaid judge, at the request of the counsel for the plaintiffs, did put his seal to this bill of exceptions this nineteenth day of April, anno Domini 1875.

JOHN CADWALADER. [SEAL.]

20 *Appeal.*

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Charles Psotta, of the city of Philadelphia, and State and county aforesaid, being duly sworn according to law, deposes and says that he was and is engaged with Louis Bergdoll, under the firm-name of Bergdoll and Psotta, in the business of brewing lager beer; that upon the day of December, 1873, the said firm were assessed by the Commissioner of Internal Revenue of the United States, and internal-revenue tax of thirteen hundred and fifty dollars "for deficiency in beer-stamps," , "for beer sold or removed, &c., without proper stamps, to October 1st, 1873," which amount, with sixty-nine dollars for penalty and costs, they afterwards, on the twelfth day of February, A. D. 1874, paid under protest to William J. Pollock, esq., collector of internal revenue for the second collection district of Pennsylvania, the said collector then having levied a distress upon the property of the said firm for the same; which assessment and payment of the aforesaid tax was, as this deponent verily believes, illegal, erroneous, and improper, for the following reasons, viz:

There was no such deficiency in beer-stamps as alleged, nor had
21 any beer been sold or removed from the brewery or premises of the said firm without proper revenue-stamps being first affixed to the barrels containing the same, according to the provisions of the act of Congress in such case made and provided.

That the said assessment was based upon improper evidence and upon insufficient grounds, as the revenue officer who reported the quantity of beer on hand at October 1st, 1873, acted on mere conjecture, without gauging the casks or otherwise ascertaining the true quantity, and without being sworn or affirmed as to the absolute or approximate correctness of his estimate.

That any difference between the amount returned as on hand by the said firm on the 1st day of October, 1873, and that actually on hand, was due to waste and leakage not credited, and to the practice of the said firm, in common with other brewers, of entering on their books, as made, beer still in the fermenting vessels according to the capacity of the vessels, though when drawn off, the beer, in consequence of the settlings and deposits remaining, would be from one-quarter to one half less; and in a number of brewings would amount to many barrels, and as the quantity returned monthly, as on hand, was estimated from the books, and not from an examination or measurement of the beer, the above overestimation of the amount brewed would account for
22 the difference on which the assessment was based.

And the said Bergdoll & Psotta now appeal to the said Commissioner of Internal Revenue, and claim that by reason of the aforesaid erroneous assessment and payment of the sum of thirteen hundred and fifty dollars tax and sixty-nine dollars penalty and costs, they are entitled to have the sum of fourteen hundred and nineteen dollars ($1,419.00) refunded, and they now ask and demand the same.

And this deponent further makes oath that said Bergdoll & Psotta have not heretofore made or presented any claim for the refunding of the above amount, or any part thereof.

Upon the receipt of a notice from the office of the collector of internal revenue for the second collection district of Pennsylvania, dated January 26, 1874, informing said Bergdoll and Psotta that "the tax against you for defi. beer stamps, amounting to $1,350, is due or payable on or before the last day of January, and unless paid within that time it will become my duty to collect the same with a penalty of five per centum additional and interest at one per cent. per month," George W. Thorn, esq., attorney for the said firm, and at their instance, addressed a letter to the Hon. John W. Douglass, Commissioner of Internal Revenue, dated January 26, 1874, in relation to said assess-
23 ment; to which the Commissioner replied by letter, addressed to George W. Thorn, esq., dated January 28, 1874, in which he informed M'r Thorn that Collector W. J. Pollock, 2nd district of Pennsylvania, "has this day been furnished with a copy of your letter, also a full statement of the facts relating to said assessment. You will therefore please consult with Collector Pollock in relation thereto."

Collector Pollock did not, upon application to him, change the assessment, but, on the contrary, gave notice by George Turner, deputy collector, to Bergdoll & Psotta, dated Feb. 2nd, 1874, that the said tax of $1,350, "being for beer sold or removed, etc., without proper stamps to October 1st, 1878," had been assessed against them and transmitted to him by the Commissioner of Internal Revenue, demanded payment of the said tax with penalty, and threatened to collect the same by distraint and sale of property of the said firm, if the said tax was not paid within ten days; that said notice and demand was followed by distraint of property of the firm on the twelfth day of February, 1874, when the said firm paid under protest the said tax, penalty, and costs, as hereinbefore mentioned.

Several affidavits were taken at the office of the said collector,
24 and, as this deponent was informed and believes, were transmitted to the said Commissioner, to wit, those of Frederick Geissheimer, Charles Bochmer, and Augustus Laubscher, made before A. L. Magilton, deputy collector of the second district of Pennsylvania, November 28th, 1873, and the affidavit of this deponent, taken before the same deputy collector, December 8th, 1873.

CHARLES PSOTTA.

Sworn and subscribed before me this day of , 1874.

A. L. MAGILTON,
Dep. Collector.

25 (Copy.)

17. Monthly notice. List . Dec. Div. .

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
2 DISTRICT, STATE OF P'A,
Jan'y 26, 1874.

M. BERGDOLL & PSOTTA:

The tax assessed against you for defi. beer stamps, amounting to $1,350.00, is due and payable on or before the last day of January, and unless paid within that time it will become my duty to collect the same, with a penalty of five per centum additional, and interest at one per centum per month.

GEO. TURNER,
Dep. Collector.

☞ Bring this notice with you.

21. General demand for taxes. Dec. List . Div. .

26 OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
2 DISTRICT, STATE OF PENN'A,
Feb'y 2, 1874.

M. BERGDOLL & PSOTTA:

A tax, under the internal-revenue laws of the United States, amounting to thirteen hundred & fifty $\frac{}{100}$ dollars, being for beer sold or removed without proper stamps to Oct. 1st, 1873, has been assessed against you and transmitted to me by the Commissioner of Internal Revenue. The same not having been paid within the time required by law, you became liable to pay five per centum additional upon the amount thereof, and interest at one per centum per month from the 1 day of February, 1874, and demand is hereby made upon you for the said tax, with the additional five per centnm and such interest as may accrue before payment. If not paid within ten days from the personal service or mailing hereof, it will become my duty to collect the same by distraint and sale of property.

Payment to be made to W'm J. Pollock, at No. 134 So. 2nd st.

Am't of tax	$1,350 00
Penalty	67 50
Total	1,417 50

GEO. TURNER,
Dep. Collector.

☞ Bring this notice with you.

27 List. Dec. Form 23.

COLLECTOR'S OFFICE, U. S. INTERNAL REVENUE, FOR THE
SECOND COLLECTION DISTRICT OF PENNSYLVANIA,
134 *So. 2nd st., second story,*
Philadelphia, Feb'y 12, 1874.

M. BERGDOLL & PSOTTA:

SIR: Take notice that I have this day levied upon such of your property at 29th & Parrish st. as is liable to distress for United States internal-revenue tax due by you, amounting to $; and you are hereby notified not to remove any of said property without payment of said tax and the expenses of the distress thereon. Any such removal will be at your peril.

If payment of said tax and the cost of distress, etc., is not made before 12 m. to-morrow, the property levied upon will be taken possession of, which will materially increase the charges.

Tax	$1,350 00
Penalty	67 50
Interest	
Warrant	1 00
Commission	
Notice	
Mileage service	50
	$1,419 00

Very respectfully,

WILLIAM J. POLLOCK,
Collector.

Bring this notice to the office.

No. 23.—*Alphabetical list of persons in t*
by the Commissio

1	2	3
	Name.	Location and post-office add
1	Allison, Taylor	Darby Road, bel. 42 st
2	Arnold, Mrs	1239 No., 10th "
3	Boileau, Albert D.	Philadelphia
4	Balasonvis, Louis	1308 Callowhill st
5	Black, John	1628 Catharine "
6	Black, Robert	3431 Darby Road
7	Bergdoll & Psotta	
8	Carr, Patrick	415 So. 17th st
9	Clark, Mary Ann	3309 Darby Road
10	Crossin, James	518 So. 18th st
11	Closs, Charles	
12	Draper, John	S. E. cor. Broad & Callowhil
13	Eble & Herter	
14	Estate of John Cunningham	City of Philadelphia, P'a
15	Estate of Geo. M. Wharton	City of Philadelphia, P'a
16	Eisele, Franz	
17	Fagen, Peter	3220 Market st
18	Ferrie, Patrick	2337 Callowhill st
19	Foley, William	3218 Market "
20	Goldbeck & Presser	
21	Gilligan, William	1910 Callowhill st
22	Givin, M	S. W. cor. 20th & Vine "
23		
24	Harrington, James	324 No., 17th st
25	Heuser, William	3315 Darby Road
26	" "	" " "
27	Hilmer, Henry	3349 " "
28	" "	" " "
29	Horan, Bernard	2309 Callowhill st
30		

NOTE.—The collector will, before sending this list to the Commissi
Nos. 2, 3, 4, 5, 6, and 13, and also enter in column No. 15 any special fac
On the list being returned with columns Nos. 7, 8, 9, and 14 filled up b
the collector will collect the amounts due, filling up, at the time o
Nos. 10, 11, and 12. On payment of special taxes, the collector will
tax stamp as receipt for the amount stated in column No. 14, and will
only for the amounts stated in columns Nos. 8 and 10. Collectors will
whatever in columns 7, 8, 9, and 14.

(Indorse

28 (1)

UNITED STATES INTERNAL-REVENUE
COLLECTOR'S OFFICE, 2 DISTRICT OF P'A,
Feb'y 12th, 1874.

Received of Bergdoll & Psotta thirteen hundred and fifty $\frac{}{100}$ dollars, tax on—

Deficiency beer stamps	$1,350 00
5 per cent. penalty	$67 50
"Paid under protest"	$
Total	$1,417 50

being amount assessed on list for Dec., 1873.
$1,417.50.

JOHN N. MITCHELL,
Collector.

29 PHIL., *February* 12, 1874.

WILLIAM J. POLLOCK, Esq.,
Collector of Internal Revenue in the Second District of the State of Pennsylvania:

DEAR SIR: Please notice that we pay to you the amount of tax, ($1,350.00,) penalty, ($67.50,) and interest mentioned in your notice to us, dated February 2nd, 1874, under protest that the said tax, penalty, and interest has been unlawfully assessed and demanded from us, and that we are not liable, by law, to pay the same. This payment is made to prevent the distraint and sale of our property, threatened in your said notice, and we hereby declare and give notice that we shall bring suit, according to law, to recover back the money now paid to you.

Very resp'y, yours,
(Signed) BERGDOLL & PSOTTA.

30 (Copy.)

UNITED STATES INTERNAL-REVENUE
COLLECTOR'S OFFICE, 2ND DISTRICT PENNSYLVANIA,
Philadelphia, Penn'a, November 23rd, 1874.

(Copy.)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Nov. 21st, 1874.

SIR: The following-named claims for the refunding of taxes paid on "deficiency of beer" have been rejected for the reason that the taxes were properly assessed and collected.

Leimbach & Mohr	$107 10
Bergdoll & Psotta	1,417 50
Eble & Herter	61 95
Goldbeck & Presser	43 05
Franz Eisele	560 70
F. A. Poth	131 25

Respectfully,
(Signed) J. W. DOUGLASS,
Commissioner.

To W'M J. POLLOCK,
Collector 2nd Dis't, Philadelphia, Penn.

32 UNITED STATES,
Eastern District of Pennsylvania, set:

The President of the United States to the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between Louis Bergdoll and Charles Psotta, trading as Bergdoll & Psotta, plaintiffs, and William J. Pollock, collector of internal revenue, defendant, in a plea of trespass on the case, a manifest error has intervened to the great damage of the said Bergdoll & Psotta, plaintiffs, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the justices of the Supreme Court of the United States, at Washington, in the District of Columbia, on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Philadelphia, this twenty-fifth day of August, A. D. one thousand eight hundred and seventy-five, and in one hundredth year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk Cir. C't U. S., E. D. of P'a.

33 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Samuel Bell, clerk, do certify the foregoing to be a full, true, and faithful copy of the record and proceedings of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between Bergdoll & Psotta, plaintiffs, and William J. Pollock, defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this twenty-fifth day of August, A. D. 1875, and in the one hundredth year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk Cir. C't. U. S., E. D. of P'a.

34 *Assignments of error.*

In the Supreme Court of the United States. No. . October T., 1875.

LOUIS BERGDOLL AND CHARLES PSOTTA, trading as Bergdoll & Psotta, plaintiffs in error,
v.
WILLIAM J. POLLOCK, COLLECTOR OF INTERNAL REVENUE, etc., defendant in error.

The circuit court of the United States, in and for the eastern district of Pennsylvania, erred—

First. In overruling the plaintiff's offer to prove by Frederick Geissheimer, a witness called and sworn on the part of the plaintiff:

"That he was a clerk of the plaintiffs' at their brewery; that the plaintiffs were brewers of lager beer only, and that from the date at which the internal-revenue law of 1866 went into effect until May, 1873, when the witness left the employment of the plaintiffs, no beer was sold or removed from the plaintiffs' brewery, for consumption or sale, except in barrels or parts of barrels, which were all duly stamped with
35 an internal-revenue stamp of the United States of the denomination of one dollar for each barrel, and proportionately for the parts of barrels, as required by the act of Congress in such case made." To be followed by other evidence showing that all barrels and parts of barrels containing beer, and sold at the plaintiffs' brewery, or removed therefrom for consumption or sale subsequently to the first day of May, 1873, were in like manner stamped. (Record, page .)

Second. In overruling the plaintiffs' offer to prove by John Joseph Alter, a witness called and sworn on the part of the plaintiffs:

"That the plaintiffs had made their monthly returns to the collector regularly until and including the month of December, 1873, and that there was no understatement or undervaluation in any of said returns of the quantity of beer brewed, or of beer sold or removed from the plaintiffs' brewery for consumption or sale, and that none of said returns were false or fraudulent." (Record, page .)

36 Third. The assessment made by the Commissioner of Internal Revenue was unwarranted by law. (Record, page .)

W'M S. PRICE,
Per S. G.,
Att'y for Pl'ffs.

To clerk S. C. of U. S.
SEPT. 9, 1875.

(Indorsed:) Supreme Court U. S., 1875, Oct. term. No. 581. Bergdoll & Psotta, pl'ffs in error, v. William J. Pollock, def'd't in error. Assignments of error. Filed 10th September, 1875. W'm S. Price, att'y for pl'ffs.

(Indorsement on cover:) Supreme Court U. S., 1875, Oct. term. No. . Louis Bergdoll and Charles Psotta, trading as Bergdoll & Psotta, plaintiffs in error, vs. William J. Pollock, collector of internal revenue, defendant in error. Record.

(Second indorsement on cover:) No. 113. Louis Bergdoll & Charles Psotta, plaintiffs in error, vs. William J. Pollock, collector of internal revenue. E. Pennsylvania C. C. U. S. Filed 10th September, 1875.

IN THE

Supreme Court of the United States.

Louis Bergdoll and Charles Psotta, trading as
BERGDOLL & PSOTTA,
Plaintiffs in Error,
vs.
WILLIAM J. POLLOCK, Collector of Internal Revenue,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

SAMUEL GORMLEY,
WM. S. PRICE,
GEO. W. THORN,
for Plaintiffs in Error.

Jackson Bros., Printers, 404 Library St., Philadelphia.

IN THE

Supreme Court of the United States.

No. 113.

Writ of Error to the Circuit Court for the Eastern District of Pennsylvania.

LOUIS BERGDOLL AND CHARLES PSOTTA,
COPARTNERS AS
BERGDOLL & PSOTTA,
Plaintiffs in Error,

VS.

WILLIAM J. POLLOCK,
COLLECTOR OF INTERNAL REVENUE,
Defendant in Error.

HISTORY OF THE CASE.

In the Court below the action was assumpsit, brought by Bergdoll & Psotta, brewers, to recover from William J. Pollock, Collector of Internal Revenue for the Second Collection District of Pennsylvania, the sum of $1,417.50, illegally assessed against them for alleged deficiency in beer stamps, and penalty, which sum was paid by Bergdoll & Psotta to said Collector, under protest, and to relieve their property from distress.

Bergdoll & Psotta stand No. 7 on the alphabetical list of persons assessed for the month of December, 1873, immediately preceding page 11 of the record. The entry against

them in column 5 of the list is, "1350 bbls. beer sold or removed, &c. without proper stamps to Oct. 1, 1873," carried out in column 7 at $1350.

On the second day of February, 1874, Bergdoll & Psotta were served with a formal demand for payment to the Collector of said $1,350, and $67.50 for penalty, within ten days, or that the same would be collected by distraint and sale of property; and this was followed by a levy and distress on the twelfth of February, (record page 10,) whereupon Bergdoll & Psotta on the same day paid the money, under protest. The Collector's receipt to them for the money, and their protest, are in the record, page 11.

Having thus paid to the Collector the sum demanded, Bergdoll & Psotta immediately appealed to the Commissioner of Internal Revenue at Washington, in conformity with the provisions of Section 3226 of the Revised Statutes and the regulations of the Secretary of the Treasury in such case. The appeal will be found in the record, page 8, and its rejection by the Commissioner at the bottom of page 11, under date of November 21st, 1874. The action in the Court below was commenced on the fifth day of December, 1874.

The demand on Bergdoll & Psotta for $1,350 having been predicated on the allegation that they had sold or removed 1350 barrels of beer without affixing proper stamps on the same, they offered to prove on the trial, by Frederick Giersheimer, that he was their clerk at the brewery; that Bergdoll & Psotta were brewers of lager beer only, and that from the date at which the internal revenue law of 1866 went into effect until May, 1873, when the witness left their employment, no beer was sold or removed from their brewery for consumption or sale except in barrels or parts of barrels, which were all duly stamped with an internal revenue stamp of the United States of the denomination of one dollar for each barrel, and proportionately for the parts of barrels, as required by the Act of Congress in such case made. To be

followed by other evidence showing that all barrels and parts of barrels containing beer, and sold at Bergdoll & Psotta's brewery, or removed therefrom for consumption or sale subsequently to the first day of May, 1873, were in like manner stamped.

This offer of evidence was overruled, to which an exception was taken.

There was a further offer of proof by John Joseph Alter, that Bergdoll & Psotta had made their monthly returns to the collector regularly until and including the month of December, 1873, and that there was no under-statement or undervaluation in either of said returns of the quantity of beer brewed, or of beer sold or removed from their brewery for consumption or sale, and that neither of said returns was false or fraudulent.

This offer of evidence also was overruled, to which an exception was taken. Printed Record, page 7.

BRIEF OF ARGUMENT FOR PLAINTIFFS IN ERROR

The plaintiffs in error are brewers of lager beer only; and as such brewers they are required by Section 3337 of the Revised Statutes to keep a daily account, and render a monthly statement to the collector, verified by affidavit, of the *estimated* quantity in barrels of the beer brewed, and the actual quantity sold or removed for consumption or sale during the preceding month.

Prior to the Act of Congress of June 6th, 1872, the law was otherwise in this, that by the provisions of the Act of July 13th, 1866, Section 49, the brewer was required to keep a daily account, and render monthly returns to the assessor, of the actual quantity in barrels and fractional parts of barrels of beer made.

The peculiar process of making lager beer, and the time consumed in making it, rendered an exact compliance with this law impossible, and it was modified by the Act of June 6th, 1872, so as to require an account and returns of the estimated quantity of beer produced, as now found in Section 3337 of the Revised Statutes.

The assessment in this case was made under Section 3437 of the Revised Statutes, which provides that whenever any article upon which a tax is required to be paid, by means of a stamp, is sold or removed for sale by the manufacturer thereof, without the use of the proper stamp, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such removal or sale, upon such information as he can obtain, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor upon the manufacturer or producer of such article. He shall certify such assessment to the collector, who shall immediately demand payment of the tax, and, upon neglect or refusal of payment by the manufacturer or producer, shall proceed to collect the same in the manner provided for the collection of other assessed taxes.

It is submitted that the assessment made against the plaintiffs in error is not such an one as is required by the foregoing provision. It is too indefinite and uncertain, to say the least of it.

The paper purporting to contain an assessment against the plaintiffs in error, (record, page 11,) is entitled an "Alphabetical List of persons in the Second Collection District of the State of Pennsylvania liable to Tax under the Internal Revenue Laws of the United States, and the amount assessed by the Commissioner of Internal Revenue for the month of December, 1873, and certified to the Collector of said district for collection."

In the column numbered 5, and under the title "for what period assessed," is entered, opposite the names of the plain-

tiffs in error, No. 7 on the list, "1350 bbls. beer sold or removed, &c. without proper stamps to Oct. 1st, 1873," carried out $1,350, as a charge against them.

The assessments purport to be for the month of December, 1873. The charge against the plaintiffs is for 1350 barrels of beer removed at some unspecified time or times prior to October, 1873. It was not, therefore, an assessment for December, 1873.

The assessment was not made upon the plaintiffs' returns to the Collector, but was made arbitrarily and without notice to the parties so assessed. Surely some reasonable degree of definiteness and certainty should be observed in such an assessment. When, in what month or months, or even in what year or years, is it alleged that the said barrels of beer were removed? For aught that appears, the alleged removal may have taken place in the year 1866, when the tax by stamps on barrels of beer was established, or at any intervening time between that and October, 1873. Or it may have been more than two years before December, 1873, and then the Commissioner would be without authority, according to the provisions of Section 3437 above cited, to make such an assessment.

It is submitted also, that the plaintiffs' offers of proof in the Court below, (record page 7, secs. 18, 19,) should have been admitted.

The offers were to prove that from the date at which the internal revenue law of 1866 went into effect, until and including the month of December, 1873, when the assessment was made, no beer was sold or removed from the plaintiffs' brewery for consumption or sale except in barrels or parts of barrels, which were all duly stamped with an internal revenue stamp of the United States of the denomination of one dollar for each barrel, and proportionately for the parts of barrels, as required by the Act of Congress in such case made. Also

that the plaintiffs made their monthly returns to the Collector regularly during the same period, and that there was no under-statement or under-valuation in either of the said returns of the quantity of beer brewed, or of beer sold or removed from the plaintiffs' brewery for consumption or sale, and that neither of said returns was false or fraudulent.

The plaintiffs had shown the exaction of the money from them, and it was necessary for them to show that the exaction was wrongful. They had shown by the Commissioner's list of assessments for the month of December, 1873, upon what allegation the money was exacted, and in order to establish that the exaction was wrongful they offered to prove that the allegation contained in the Commissioner's list was unfounded. There was no other method of establishing the fact.

In Dandelet *vs.* Smith, 18 Wallace, 642, which was an action against the Collector to recover back money paid him for alleged deficiency of beer stamps, it was said by this Court, page 647, that the exact truth always lies in the knowledge of the manufacturer. His books show, or ought to show, everything that he has produced, and in an investigation of this kind, *if he shows that his returns or stamps fully equal the amount of his production and sale, the burden will then be on the Government to show a deficiency.*

The plaintiffs' right to make such proof as was offered in the present case, seems to be distinctly recognized in Dandelet *vs.* Smith.

And again, in Cheatham *vs.* United States, 2 Otto, 85, also an action to recover back money paid under protest to a collector, for internal revenue taxes, this Court, reviewing the system of taxation, say, page 88,—so also in the internal revenue department, the statute allows appeals from the assessor to the commissioner of internal revenue; and if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

This case recognizes that proof that the tax was wrongfully exacted may be given, and just as offered in the case in hand, in the Court below.

Section 3225, of the Revised Statutes, provides that when an assessment is made for under-statement or under-valuation in any list, statement, or return, no taxes collected under such assessment shall be recovered by any suit, unless it is proved that the list, statement, or return was not false nor fraudulent, and did not contain any under-statement or under-valuation.

Now that the office of Assessor is abolished, and appeals are from the Commissioner to the Commissioner, they are but requests to him to review his own assessment. This form was observed in the present case, record page 8, but did not prevail, as will be seen by the Commissioner's rejection of it, at the foot of page 11, of the record. This suit followed in due time.

The following Sections of the Revised Statutes contain special provisions in relation to suits to recover back money paid for taxes illegally assessed or collected: Sections 3220, 3225, 3226, 3227, 3228.

S. GORMLEY,
W. S. PRICE,
G. W. THORN,
for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

LOUIS BERGDOLL ET AL.
vs.
WM. J. POLLOCK, COLLECTOR. } No. 113.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

DEFENDANT'S BRIEF.

The only question in this case arises from the exclusion of parol testimony offered by the plaintiffs to prove that no beer had been sold by them, or removed from their brewery for consumption or sale, without being stamped; and that they had made correct monthly returns of all beer so sold or removed.

The amount of stamps which a brewer should use is not by the law left to be established by parol testimony, but from the books required to be kept at the brewery in a certain form, supported by the affidavits of the bookkeeper and of the brewer. (Act of June 6, 1872, c. 315, § § 18–22, in 17 Stats., 245–7.) This book is to be examined by the collector. It states the quantity of

beer made, the grain and malt used, and the number of barrels, &c., sold and removed. The commissioner has ascertained the quantity of beer that can ordinarily be made from a bushel of grain or malt. From this data the collector determined the amount of the tax. That it was correct, according to their books and returns, plaintiffs did not deny, but tried by parol to vary these statements as to the amount of beer, &c., on hand. (Record 8, folio 21.)

EDWIN B. SMITH,
Assistant Attorney-General.

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Defendant's Supplemental Brief.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

DEFENDANT'S SUPPLEMENTAL BRIEF.

I.

In the brief originally filed in defense of this cause it was said: "The only question in this case arises from the exclusion of parol testimony offered by the plaintiffs to prove that no beer had been sold by them, or removed from their brewery for consumption or sale, without being stamped; and that they had made correct monthly returns of all beer so sold or removed;" but another point, mentioned in the plaintiffs' brief, is presented as the one determining the action of the learned district judge, and it is one of general interest in all similar cases; therefore we avail ourselves of the permission given to reply to the plaintiffs' brief—not filed till after the cause was submitted—and offer a few sug-

gestions sustaining the propriety of the judge's ruling. Before doing so, however, we will add, as to the point mentioned in the brief already filed, that the Commissioner had the right to assess for an apparent deficiency of beer produced from the quantity of malt, &c., consumed; that the power so to assess was claimed by Commissioner Pratt, in his correspondence with the American Brewers' Association, in December, 1875, found in 21 Int. Rev. Rec., 394, under the statutes relating to the books to be kept and returns to be made by brewers, to which reference was made in my former brief. They are found consolidated in Revised Statutes, § 3337.

It is analogous to the power to assess distillers according to the assessor's estimate of the producing capacity of the grain they use, instead of upon the actual product. (See *Collector* v. *Beggs*, 17 Wall., 188, 189.)

In Burroughs on Taxation, 639, it is said, "The brewer, in substance, makes the assessment of the tax on his own manufacture and pays the tax to the collector. If the brewer fails to pay the tax on malt liquors manufactured, the Commissioner has authority to make an assessment for all liquor which has not paid the tax by stamps, as required by law. The monthly returns made by the brewer furnish the information from which the Commissioner can ascertain whether the brewer has produced from the quantity of grain used the quantity that by good management could have been produced. This deficiency would afford sufficient evidence to justify him in making an assessment on that quantity, as not having paid the tax by stamps, as required by law. The rule adopted by the department was to allow two and a half bushels of grain to a barrel of thirty-one gallons. If the product returned by the brewer as placed

upon the market did not equal the quantity which the returns show ought to have been made, the brewer was assessed for the deficiency."

So, by the passage cited by appellants from *Dandelet* v. *Smith*, (16 Wall., 647, bottom, and 648, top,) it appears that the brewer may properly be assessed for all beer for which his books show that he ought to account.

The act of July 20, 1868, c. 186, § 20, (15 Stats., 133, bottom,) provided that "forty-five gallons of mash *or beer brewed or fermented from grain shall represent not less than one bushel of grain*, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than a gallon of molasses." The amendatory act of April 10, 1869, c. 18, (16 Stats., 42, top,) says, "Where grain or meal is mashed by hand, and without the use of steam, sixty gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain."

By the act approved May 13, 1876, c. 95, (19 Stats., 53,) it is provided that "nothing contained in" Revised Statutes, § 3337, "shall be so construed as to authorize an assessment upon the quantity of materials used in producing, or purchased for the purpose of producing, fermented or malt liquors, nor shall the quantity of materials so used and purchased be evidence, for the purpose of taxation, of the quantity of liquor produced."

The act is prospective, and not intended to affect cases where the assessment had been laid and paid years before; nor to give any right of suit against the person collecting a tax assessed upon this basis. It is a recognition of an existing, valid mode of determining the amount of a tax, but says this method shall be pursued no longer.

II.

The point to which plaintiffs in error mainly direct their brief, is that the suit properly lies against the collector for an *excessive* assessment. The court below was of opinion that, even if it could be maintained for a tax assessed upon a citizen or an article not liable to taxation, it could not be supported where the person or property was liable to assessment, and the error, if any, was only one of amount. We say that the court should have gone further, and declared that the statutes did not give relief by suit against a ministerial officer, who only obeys the mandate of the precept put into his hands for execution.

Independently of some enabling statute, of course this action could not be maintained. The act of December 24, 1872, c. 13, § 2, (17 Stats., 402, top,) provided "that the Commissioner of Internal Revenue is hereby authorized and required thereafter to make the inquiries, determinations, and assessments of the following taxes, to wit, for assessments imposed by the provisions of section twenty of an act entitled," &c., being the section above printed. These assessments are transmitted to the collector. He has no option, but must enforce them. Being regular upon its face, Mr. Pollock had to collect the tax assessed upon the plaintiffs. His warrant is his sufficient protection against *any* suit, unless some statute is shown *expressly* conferring the right of action. *Erskine* v. *Hohnbach*, (14 Wall., 613, 616–7, and cases cited;) Cooley on Taxation, 559, 560, and the seventy cases there cited from various State reports; *Nowell* v. *Tripp*, (61 Maine, 426;) *Bird* v. *Perkins*, (33 Mich., 31, bottom, citing same cases above referred to.)

If there be any such right conferred, it must be found

in those sections of the revision cited at the end of the plaintiffs' brief, *i. e.*, Revised Statutes, §§ 3220, 3225 to 3228. Section 3220 (Revised Statutes, page 621, bottom,) authorizes the Commissioner of Internal Revenue, "on appeal to him made," to refund all taxes "erroneously or illegally assessed or collected, all penalties *collected without authority*, and all *taxes* that appear to be *unjustly* assessed or *excessive in amount* or in any manner *wrongfully collected;* also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with costs and expenses of suit;" also all damages and costs in suits brought on account of the performance of official duty. It is then "*Provided*, that where a second assessment is made in case of a *list*, *statement*, or *return* which, in the opinion of the collector or deputy collector was false and fraudulent, or contained any *understatement* or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation." (Revised Statutes, page 622, top, § 3220.)

The collector would, of course, be liable for any taxes "in any manner wrongfully *collected*" by him; *i. e.*, if the wrong was in the *manner* of his collecting, even if he intended to follow the law. In such case the Commissioner may, on appeal, refund to save the tax-payer and the officer from injury by this wrong. But the next clause, in effect, says that if the citizen prefer to sue the collector for the money paid, or in tort for damages, the recovery and costs, &c., shall be paid by the United States. *It*

does not profess to confer any right of action; it only gives authority to refund without suit, or the repayment of such sums as may be recovered in such suits as would be sustainable at common law, for acts done *virtute officii.* The proviso, however, withholds this authority in cases where there has been a second assessment, because the collector is of opinion that there was an understatement or false statement in any statement, list, or return. If this case came within the first part of this section, (which it does not,) it would also come within the proviso; for the plaintiffs' return did not account for the beer on hand, according to the "statement" of their books, nor according to the material on hand, nor did they propose to show that their books and returns were true and correct, but only how it happened (as they say) that they were false, to wit, that they had knowingly returned too large a quantity of beer as on hand.

Section 3225 (Revised Statutes, page 622,) prohibits the maintenance of any suit to recover such second assessments, made because the first statement or return is thought to be false, &c., without proof of their truth, and that there was no understatement. The before-cited section forbade a repayment without suit. This section, 3225, is not an *enabling*, but a *restraining*, clause. It confers no right of action; it takes away the one which existed at common law for taxes wrongfully collected, unless certain facts be shown; or it makes this proof a condition of recovery, without compliance with which suit cannot be maintained even for taxes wrongfully or irregularly collected. It inflicts this penalty upon presumptive fraud.

The next section, 3226, simply adds another condition-precedent; declaring that suit shall not be maintained

in any case until relief has first been sought by appeal to the Commissioner. This, too, is a restraining, and not an enabling, act. It limits the right of recovery, *in such suits as might before have been maintained*, to those cases in which there has been an effort to obtain redress from the Commissioner of the wrong inflicted by the tortious method of collection pursued by the collector.

The two sections we have been considering were limits or conditions imposed upon the *method* of pursuing an existing, and not a newly-created, remedy; the next (§ 3227, Revised Statutes, pp. 622–3,) is a limitation of *time*, requiring that all such suits shall be brought within two years. It confers no right, any more than the previous sections. For a *tortious* assessment, *willfully* wrong and oppressive, though made *colore officii*, a suit would lie at common law, both for alleged penalties and taxes "collected *without authority*," * * * "or in any manner *wrongfully* collected," (Revised Statutes, 623, top,) whether the wrong be in collecting an amount in excess of the warrant, or otherwise. By this section, actions alleging such torts must be commenced within two years; and by the next (§ 3228, Revised Statutes, p. 623,) "all claims for refunding" sums which ought not to be retained in the Treasury must be made within the same period.

In short, we say that no suit would lie at common law against an officer holding a valid warrant for the ministerial acts by him done in strict obedience and conformity to his precept, which is sufficient justification for his acts; that no provision *expressly* conferring the right of action can be found in the statute, nor is the *creation* of such a right the fair implication of any clause or section of our Revise l Statutes.

In no reported case has this question squarely presented itself so as to require its adjudication by this court in any suit against a collector of internal revenue, but all such suits have been either dismissed because barred by the statute of limitations, or for want of a previous appeal to the Commissioner, or by reason of noncompliance with some other statutory condition-precedent; or, if sustained, the question either was excluded from your consideration by some stipulation that the result should be determined by the legal effect only of certain agreed facts, or else was passed, *sub silentio*, without suggestion by counsel or notice by the court.

The maintenance of suits against collectors of customs has no analogy and no bearing upon this question, for these depend upon other legal provisions (Revised Statutes, §§ 3011–12) and a very different state of facts; but a very strong support for our present position may be found in this legislation and in these facts. The collector of customs acts upon his own judgment and responsibility, and not in obedience to the mandate of a superior officer; yet the statute relating to suits against him (§ 3012) *expressly creates a right of action*, saying that "any person who shall have made payment under protest * * * may maintain an action," &c. (Revised Statutes, p. 583.)

The assessment is illegal only when either the person or thing taxed is without the jurisdiction of the assessor. If the party and any of the taxed property be assessable at all in the precinct of the assessing-officer, too high a tax is remediable *only* by application for abatement, and not by suit. *Gilpatrick* v. *Saco*, (57 Maine, 277;) *Waite* v. *Princeton*, (66 Maine, 226;) *Howe* v. *Boston*, (7 Cush.,

273;) *Lincoln* v. *Worcester*, (8 Cush., 57;) *Salmond* v. *Hanover*, (13 Allen, 119;) *Bourne* v. *Boston*, (2 Gray, 494;) *Brown* v. *Smith*, (24 Barb., 421;) *Dorn* v. *Backer*, (61 Barb., 597;) *Bashyte* v. *Shepherd*, (35 N. Y.; 8 Tiffany, 255.)

If the assessors are not liable for issuing the precepts, the collectors cannot be for obeying them, whether the assessments are regular or not, or even if the tax-payer is not within the jurisdiction of the assessors. *Carville* v. *Additon*, (62 Maine, 459;) *Nowell* v. *Tripp*, (61 Maine, 426,) where a resident of Bangor was compelled to pay a tax assessed in another town. See also the multitude of cases before mentioned.

There can be no excess in the *collection* unless more than the amount indicated in the warrant is collected; in which case (as before said) the collector would be liable independently of statute, because the act would be his personal tort, and not one done in obedience to his precept.

EDWIN B. SMITH,
Assistant Attorney-General.

large amount, where drafting is done upon collateral and overdrafts allowed very frequently, to', buy the New York bank to their correspondents.

Q. 17. Suppose a banker in Cincinnati to sell his draft on New York against what he supposed to be his cash balance, but learning after its sale and before its presentation that in fact he had no balance there, too late to remit, what, according to the custom of business, would he do here to protect his honor?

(Question objected to as irrelevant and incompetent.)

Ans. He would, in honor and honesty, according to the rules of banking, secure the party to whom the check was sold, and thereby, in my opinion, save a criminal prosecution.

94 Cross-examination:

Q. 1. For how long have you been engaged in the banking-business?

Ans. Commenced as private banker, July 17th, 1854, in this city and continued in the banking-business ever since.

Q. 2. Will not the books of the Merchants' National Bank disclose all its transactions as to loans where collaterals were hypothecated as security?

Ans. As a general rule, on long time, they do; the exceptions, which are very many, attaches itself to short time, call loans, and other transactions, where the collateral is done up in an envelope and no entry made in the books.

Q. 3. Is it customary for banks or bankers in the city of Cincinnati in good standing to borrow money on their own account and for their own use and deposit collaterals as security therefor?

95 Ans. It is, and has been customary, more or less, ever since I have been in Cincinnati, for banks and bankers to raise money in that way.

Q. 4. Give me the name of any bank in good standing, or private banker in Cincinnati, who do business in that way, and any transaction in which they have done so, if you know of any.

Ans. We have loaned money that way to M'r Mowry, then president of the Third National; M'r Stone, former president of the 4th National; M'r Thompson, former president of the Central National; M'r Rogers, former president of The Ohio National. I can't say what is the custom of other banks; I can only speak as to our own. I believe, however, it is the custom with other banks to accommodate their neighbors on collateral.

Q. 5. Were not all the parties you have named out of business as bankers at the time of failure of Homans & Co., and were not Stone and Mowry, Thompson and Rogers, each or all of them, engaged

96 in business other than as bankers, as well as bankers, at the period when their transactions with you took place?

Ans. I think they were; they may have been, but our transactions were with them as president or officers of the banks named.

Q. 6. You say you believe a great deal of that business is still transacted between banks themselves and with private bankers of good standing. Give us the grounds of your belief, and any transactions of this kind you may know of.

Ans. This business was done much more largely during the war, and until about the begin'ing of 1870, than it is at present. We have within this year (1872) continued to make some transactions of the kind named.

Q. 7. Is it usual or customary for a banker in good standing and good

credit, who is not a stock-broker, to frequently make this sort of a transaction as borrower, not as a lender?

97 Ans. It is not so frequent as before 1870, and particularly not so frequent as it was previous to the failure of Homans & Co., and prior thereto, including during the war.

Q. 8. Give me the name of any bank or banker who was in the habit of so doing during the years 1868 and 1869, other than Homans & Co.?

Ans. I don't remember at this moment of any others, outside of those bankers who are engaged in the stock business with banks in this city.

Q. 9. Are those persons who are stock-brokers in the city of Cincinnati recognized by banks and bankers as stock-brokers or bankers?

Ans. They are recognized as both where they do both business.

Q. 10. Are there or have there been in the city of Cincinnati, since 1868, any stock-brokers who have done any business, or any extensive business, in the legitimate banking-line?

98 Ans. There have been quite a number who have carried on both brokerage and legitimate banking-business to a large extent; E. Kinney & Co., N. J. Nettelton & Co., Espy, Heidelbach & Co., Seasongood, Netter & Co., A. G. Burt & Co., Samuel B. Keys & Co.

Q. 11. Now, are E. Kinney & Co., Seasongood & Co., Espy, Heidelbach & Co., N. G. Nettelton & Co., known as stock-brokers?

Ans. they are known to us as dealing in stocks as well as regular bankers.

Q. 12. Are they known so in the business community at large?

Ans. I suppose so.

Q. 13. Do you mean to say or be understood that it is customary among bankers in good standing and of undoubted responsibility to sell their sight exchange on New York and give collaterals as security for its payment?

99 Ans. I don't say that it is common to do so, but I do say that it is common to draw against collateral in New York or to arrange with parties here.

Q. 14. The interrogatory I desire you to answer is, is it usual or customary for banks or bankers in good standing in the city of Cincinnati to sell their sight drafts on New York to other bankers in said city, and accompany the sale with a pledge of collaterals from the seller to the buyer?

Ans. It is neither usual or common.

Q. 15. Is not such a transaction out of the usual and ordinary course of business?

Ans. It is.

Q. 16. Did you ever have any transactions with Homans & Co. in which they sold you their sight exchange on New York and gave you collaterals to secure its payment, save that of the 25th of August, 1869, to which you have referred? If so, state how many of such trans-

100 actions you have had with them; by whom were they negotiated on the part of your bank, and the date and amount of each of such transactions.

Ans. I don't remember of any one at this time.

Q. 17. Would you not have regarded a banker with suspicion who would propose to sell sight exchange on New York, and who was obliged to bolster up that sale by depositing collateral with the purchaser to protect him against any loss by cashing the sight draft?

Ans. Not invariably; it would increase my confidence sometimes, especially where the person is a private banker, without knowledge of his means exactly.

Q. 18. Is or was that the ordinary and customary way of bankers in Cincinnati in disposing of their sight exchange on New York?

Ans. It is neither ordinary nor customary.

101 Q. 19. Were not Homans & Co., up to the date of their failure, of such good standing and credit as to be able to dispose of their New York exchange in the ordinary and customary way?

Ans. They were regarded for truth and honesty as unexceptional, but their exchange was not regarded as No. 1 on the street without collateral.

Q. 20. How much exchange of Homans & Co., in round numbers, as near as you can now recollect, did your bank purchase of Homans & Co. whilst you have been connected with it?

Ans. Previously to the spring and summer of 1869 we bought a great deal, but after learning of their connection with Southern Ohio Coal Company we did not purchase much, but during the early part of that year I suppose it would amount to $100,000, or thereabout.

102 Q. 21. Will not the books of your bank show the purchases of exchange from Homans & Co. in the year 1869, or have you any record that will show it?

Ans. We have not, but our letter-book shows that on August 25th, $10,000, the one in question; August 20th, $10,000; August 14th, $10,000; August 4th, $7,500; July 15th, $10,000; June 28th, $13,369.79, May 24th, $5,000.

Q. 22. Will you please state what collaterals, if any, accompanied these sight-drafts.

Ans. I don't remember of any.

Q. 23. State what drafts, if any, at sight, were sold by Homans & Co., accompanied by collaterals, in the Cincinnati market.

Ans. We handled a good deal of other parties' paper with Homans' endorsement thereon, but I have no personal knowledge of any such.

103 Q. 24. Who was present beside yourself and Benjamin Homans at the conversation which took place between you and Homans on 25th of August, which you have detailed in your examination-in-chief?

Ans. No person, to my recollection. It took place in the afternoon.

Q. 25. Tell us precisely, or as near as you can, what was said by you and what was said by Homans in this conversation.

Ans. The language I cannot exactly remember. He came to sell exchange. I hesitated a little about it, and he said it should be all right.

Q. 26. Was it upon that assurance you purchased the $10,000 in controversy?

Ans. It was, and believing him to be an honest man and that he would pay.

Q. 27. What was said in that conversation, if anything, relative to giving you collaterals?

104 Ans. I have no recollection of the language. I have no recollection of anything being said about giving collaterals.

Q. 28. Were not all the transactions with Homans & Co. in which you received collaterals either upon time or upon call loans?

Ans. I really could not at this time tell whether they all were or were not. There were some. I have no recollection of the precise business. We frequently took business-paper from him as collateral.

Q. 29. About what time on the morning of the 26th was it that you received these collaterals?

Ans. I found them in an envelope directed to me on the cashier's

desk when I came to the office, at which I arrived as a rule at from 7 to 8 o'clock at that season of the year.

Q. 30. Is it not the fact that the collaterals were not delivered at your bank until between ten and ten and one-half o'clock on the morning of 26th of August?

105 Ans. My recollection very distinctly is that I found them there not later than half past eight, but I cannot say how much earlier they were delivered.

Q. 31. Is it, or was it, in the usual or ordinary course of business for a banker to sell sight exchange on New York, and on the next day to notify the purchaser that the check would not be paid, and give him, unsolicited, collaterals to secure it?

Ans. We never had but the one case; with us there never was such another case in Cincinnati.

Q. 32. Is such a transaction usual or ordinary among bankers, to your knowledge?

Ans. I have no knowledge of transactions of the kind outside our own bank, and we have had but this one instance.

Q. 33. Have all the collaterals which were given you by Homans & Co. been paid?

106 Ans. I believe they have been, except the Diamond Mill, for which, I think, we have received something in the way of dividend or dividends.

Q. 34. In the conversation between you and Homans, on the afternoon of the 25th, you say part of it was confidential, as you supposed, as one of the managers of the clearing-house. State what that conversation was, or so much as you recollect.

Ans. My recollection is, as stated in my examination-in-chief, that it was to prepare means to meet outstanding checks held over by parties connected with the clearing-house.

Q. 35. Under ordinary circumstances, would you not consider it rather strange in a banker doing a deposit business being obliged to have checks upon him held over and shin to raise money to pay them?

Ans. The shinning is very common to prepare, but I am not

107 aware of a good banker, nor of Homans, requesting checks to be held over.

Q. 36. Suppose a banker should sell you a sight-draft on New York, and afterward ascertain the funds were not there to pay it upon the same day he had obtained your money, would you not expect, under such circumstances, that if the banker was solvent, that immediately upon ascertaining the fact he would return you your money?

Ans. I would, or its equivalent.

Re-examination:

Q. 1. State whether the exigencies of business do or do not frequently make it necessary for bankers to raise money by temporary loans to meet current demands of depositors and others.

Ans. They do.

Q. 2. State the forms in which such loans are variously made, and whether upon securities deposited as collaterals or otherwise.

108 Ans. Sometime' by selling exchange on New York or elsewhere, and upon call loans by the hypothecation of collaterals.

Q. 3. State whether such temporary exigencies are or are not sometimes, if not frequently, met by raising money by the sale of sight exchange, treated *as* the form of a loan.

(Objected to as incompetent.)

Ans. Money is frequently in that way raised.

Q. 4. In such cases, when the banker selling exchange should have reason to believe, before its presentation, that his check might not be paid, what would be the usual course of business with reference to replacing the money here, or securing the purchaser of his draft?

(Question objected to as incompetent.)

Ans. I have known the money to be returned in some instances; in others collaterals are given. One or other of these are invariable
109 among solvent, honest bankers.

Q. 5. State what was the application made to you by M'r Homans on August 25th, 1869, which led to your purchase of his check on New York, as nearly as you can, in the language used.

(Question objected to because the witness has already been examined in chief upon this subject.)

Ans. On the afternoon of August 25th, 1869, M'r Homans applied to me, in person, to sell ten thousand dollars in exchange, alleging as his reason for such application that he had the use of some money on call loans which had been called in a few days before, or within the few days immediately preceding; that there were also clearing-house check or checks to a pretty large amount held over by bankers, which might be called for, and that he wanted to be prepared with funds in case the same would be presented, and assured me that the same was all right or should be all right; that he had a friend in or connected with
110 the Market National Bank of New York that had always seen that his checks were protected; but in any event he would see this amount was made all right.

Recross-examination:

Q. 1. Was anything said upon that occasion by Homans relative to there being no funds in New York to pay the sight exchange?

Ans. Not directly.

Q. 2. Is it in the ordinary course of business for bankers to buy exchange at sight upon correspondents when the purchasing banker knows that the drawer has no funds on hand with the drawer with which to pay the draft?

Ans. Banks frequently sell exchange, depending upon collections or deposits, without having the funds on hand. We have often purchased drafts which were dependent upon deposits being made after the drawing of the same, but previous to the presentation; and during a
111 close money-market, drafts are made against remittances made on the same day; but the ordinary course is, at least among stronger banks, to draw against actual deposits or remittances.

Q. 3. Is not drawing against actual deposits the usual way, and the other ways you have stated the exception?

Ans. Actual deposits, collections, and remittances in transit are the ordinary means to check against, and the other courses referred to in my former answer are resorted to in a close money-market.

Q. 4. Is it usual or ordinary for bank or bankers to draw on New York at sight, expecting their draft to be protected by some other person than their correspondent?

Ans. It is not usual, but it is sometimes done.

Q. 5. Was it a tight or a close money-market August 25th,
112 1869?

Ans. I do not think, according to my recollection, there was anything remarkable about the market in that regard; about as usual.

Q. 6. Are you positive that on August 25th, 1869, M'r Homans told

you, in order to induce you to purchase this exchange, that he had an intimate friend connected with the Market National Bank who would protect his draft?

Ans. I know that upon that very day that was the import of the language used, but exact words not remembered.

D. J. FALLIS.

EXHIBIT No. 1.

HOMANS & CO., BANKERS,
23 WEST THIRD STREET,
Cincinnati, Aug. 25th, 1869.

D. J. FALLIS, Esq., *Pres't:*

D'R SIR: A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the inclosed as security.

B. HOMANS, J'R.

"Copy."

113 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record, and the depositions of B. Homan's, j'r, Theodore Cook, Edward Albert, G. P. Griffiths, James Espy, and D. J. Fallis, filed in the case of Theodore Cook et al., trustees, *vs.* The Merchants' National Bank of Cincinnati and B. Homans, j'r, as the same are kept in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 17th day of April, A. D. 1875, and of the Independence of the United States of America the ninety-ninth.

Attest: THO'S AMBROSE,
[SEAL.] *Clerk C. C. U. S., S. D. Ohio.*

(Indorsement on cover:) No. 68. The Merchants' National Bank of Cincinnati, appellant, vs. Theodore Cook, Alexander H. McGuffey, and James W. Sibley, trustees of B. Homans, j'r, bankrupt. S. Ohio C. C. U. S. Filed 30th April, 1875.

no more checks, and close the doors, which was done, to the best of my knowledge, about 10 o'clock a. m.

9th quest. State whether you had been frequently in the habit of selling checks on New York, like those sold to Merchants' and 1st National Banks, to banks and individuals; and whether you had ever before sold such checks to either the Merchants' or 1st National Banks; and, if so, how often.

Ans. I was in the habit of selling such checks daily, in the usual course of our business. I had frequently sold such checks to each of those banks, but I cannot recollect how often, but probably as often as once a week.

10th quest. State whether you have ever known a case in your experience where, after the sale of a draft on New York, or other eastern city, by a banker, the seller of the check, either solicited or unsolicited, furnished security for the payment of it before maturity, and whether such a transaction is in the usual and ordinary course of business between bankers, and whether the sending of these bills receivable
39 to said banks was in the ordinary course of your business.

(Objected to as leading and for incompetency.)

Ans. I have never known such a case. The transaction is, of course, an unusual one. I had never known such a thing before, nor thought of doing it until this time.

11th quest. Did M'r Wood take any receipts for said bills receivable, or have said banks since given you receipts for the same? If so, produce said receipts and attach them to your deposition.

Ans. No receipt was asked or given at the time, nor since.

12th quest. What conversation, if any, have you had with any of the officers of the said banks upon the subject of the delivery to them of these bills receivable? State such conversations fully, and what passed between you upon the subject.

Ans. I remember no conversation with any of the officers of the banks, except in regard to the condition and responsibility of the payers and endorsers of the bills receivable. These conversations were some time after the sending to them of the bills receivable.

40 Cross-examination by S. R. Matthews, esq.:

1. Int. Name the teller, book-keepers, and clerks employed in your office on the 26th of August, 1869.

Ans. Teller, Edward Albert; book-keeper, B. F. Wood; correspondent, Benjamin Homans, senior. Those were all.

2nd int. Where do those persons now live?

Ans. Edward Albert is employed at the 4th National Bank of Cincinnati; B. F. Wood lives in Evansville, Ind., and is employed in a bank there; B. Homans, senior, has just removed to New York.

3rd int. Had you any transactions in the sale of exchange upon New York with the Merchants' National Bank and the 1st National Bank of Cincinnati before this of the 25th of August, 1869? If so, state to what extent with each of them.

Ans. I have had such transactions with each of those banks frequently for some years. I cannot recollect the extent; but they
41 must have been several hundred thousands of dollars in the aggregate. The books of Homans & Co. will show them all.

4th int. What was the credit of Homans & Co. in the money-market of Cincinnati up to the time of its suspending payment?

Ans. The credit of the house was good.

5th int. Was it not first class?

Ans. So far as I know, it was unquestioned. I could have sold the checks of the house on New York for almost any amount—any reasonable amount. I could have sold a hundred thousand dollars that day (Aug. 25) on 3rd street.

6th int. At the same rate at which you sold to the Merchants' & 1st National Banks?

Ans. At about the same rates.

7th int. You speak, in answer to the 3rd interrogatory in chief, of having been embarrassed for several weeks preceeding your failure. Was that embarrassment known to the Merchants' National or the 1st Nat'l Bank of Cincinnati, as far as you know?

42 Ans. I have no reason to suppose that they knew it.

8th int. Did you ever notify either of them that you were in difficulty?

Ans. I did not.

9th int. Did any one, to your knowledge?

Ans. Not to my knowledge.

10th int. Was the embarrassment you speak of known to anybody engaged in the money business in Cincinnati at that time? That is to say, was it publicly known that your house was embarrassed?

Ans. It was not known, so far as I know, to any one on 3rd street, nor privately nor publicly to persons in that business.

11th int. Did you sell any other drafts of your own on New York on Aug. 25 in this city? If so, to whom, and in what amounts, specifying each separately, as nearly as you can remember now.

Ans. There were a few sold across the counter in the usual course of business. They were of small amounts; none, I believe, over
43 $1,000. I do not remember names of the parties to whom drawn nor the amounts. The books will show.

12th int. Had you any other correspondent in New York than the Market National Bank?

Ans. We kept a small account with the St. Nicholas National Bank.

13th int. What was your cash balance at the Market National Bank on the 25th of August, 1869?

Ans. According to our books the account was overdrawn already before drawing any checks on that day. From the length of time between the drawing of checks and their presentation (frequently some days or weeks) the account was always more in our favor on their books than on ours.

14th int. How much overdrawn was it?

Ans. I do not recollect. The books will show.

15th int. Have you any arrangement with the Market National Bank by which you were entitled to overdraw your account with them?

Ans. No distinct or express arrangement to that effect, but they
44 had always paid our checks whether good or not.

16th int. Do you mean that they had permitted you to overdraw from time time? If so, to what amount?

Ans. They had frequently so permitted, once notifying us that the account was overdrawn $27,000, but this was an error of their own in omitting to enter a credit to our account.

17th int. What amount, in fact, did you ever overdraw your account with Market National Bank prior to Aug. 25, 1869?

Ans. As near as I can remember, about $15,000—possibly $20,000.

18th int. Did any of your checks of Aug. 23 or 24th, on the Market National Bank, or your other correspondent in New York, remain unpaid and go to protest? If so, state in what amounts.

Ans. There were, I believe, some checks of each of those dates protested for non-payment, while some of the 25th were paid, being presented first. I don't remember the amount of those checks. The books will show.

45 19th int. When you sold these drafts on New York to the Merchants' & 1st National Banks of Cincinnati, you expected them to be paid, did you not, on presentation?

Ans. I certainly did.

20th int. What reason had you for supposing so? Explain fully.

Ans. First, from the remittance of our current receipts of exchange, to go forward that day in the usual course of business. Second, from the loan in New York, applied for on the 24th, as stated; and third, from usual habit of the Market National Bank in paying our checks.

21st int. Explain fully what loan you refer to under the second head of your answer; to whom the application for it was made, its expected amount, and what reasons you had for supposing you could effect it, and why, if at all, it failed.

Ans. On the 24th of August, I wrote to Mr. J. S. Homans, j'r, asking him to provide for me by the 27th a temporary loan of $10,000 or $15,000, the same to be deposited to our credit at Market National Bank, if the state of our account should require it. The reason I ex-

46 pected it to be done was his tried friendship for me, as evinced on previous occasions, and $10,000 would have been provided, as requested, had not my failure, or the fact of my failure, been announced in New York by telegraph on the 26th.

22nd int. When did you send for Mr. Johnson to come to Cincinnati, which resulted in his coming here on the 25th?

Ans. Some two or three weeks before that time.

23d int. When did you first know that *you* he (?) would come in answer to your summons?

Ans. A few days thereafter he promised to come as soon as the state of his health and his private business would permit.

24th int. Did you expect him on the 25th?

Ans. I knew he was coming on that day, from information received from New York.

25th int. At what time on that day did he arrive, and at what hour did you first see him?

Ans. He arrived in the morning, when I saw him; I first saw him some time in the forenoon.

47 26th int. What is his first name and what is his business and address in New York?

Ans. Nathan T. Johnson is his name; his business is principally dealing in real estate. He can be found at No 23 Murray street.

27th int. You had no conversation with him, I understand you, about your financial condition until after 3 o'clock of the 25th of August?

Ans. I had not.

28th int. Can't you fix definitely about the hour at which you first saw Mr. Johnson on that day.

Ans. My impression is that it was between 9 and 10 o'clock in the forenoon.

29th int. Was it before or after you sold these drafts to the Merchants' and 1st National Banks?

Ans. I don't recollect how that was; I think it was before, though; come to think of it, I had either seen him or knew he was here, before selling the checks.

30th int. At what hotel did he stay in this city?

48 Ans. Usually at the Burnet House.

31st int. What did you do with the funds received by you from the Merchants and 1st National Banks for the checks sold by you to them on New York?

Ans. They were paid out across the counter for checks on Homans & Co. on the morning of the 25th of August. I think, in settlement of clearing-house balances.

32nd int. Did you on that day, after the sale of these checks to the Me'h'ts' and 1st Nat'l Banks, remit to New York, either to the Market Nat'l Bank, or any one, currency, gold, exchange, or other thing of value, to provide for the payment of the same?

Ans. We remitted on that day, by mail, sundry drafts on New York. I do not remember the amount, but it was much less than the amount of these checks.

33rd int. Your books and the books of the Market Nat'l Bank show the state of your account with that bank on the 25th day of August, 1869, and the amount of your outstanding drafts upon it, and the remittances made by you that day, will they not?

49 Ans. They will.

34th int. Were you in the city of Cincinnati on the morning of the 26th of August, 1869?

Ans. I was.

35th int. Were you at your office or bank on that morning?

Ans. I was.

36th int. At what time did you get there?

Ans. About 9 o'clock, or a little after.

38th int. What was your usual time of opening your bank for the transaction of business?

Ans. 9 o'clock a. m.

39th int. Was it open for the transaction of business on the morning of the 26th of August before you left?

Ans. It was.

40th int. Was it still open when you left?

Ans. It was.

50 41st int. When and why was it closed? State at what hour.

Ans. It was closed about 10 o'clock a. m. It was closed through my written order from Covington.

42nd int. To whom was the order sent?

Ans. I think to M'r Wood.

43rd int. Before you left the bank on the morning of the 26th, did you give the directions you speak of to M'r Wood about handing over these collaterals to the Merchants' and 1st National Banks?

Ans. I gave those instructions before leaving, contingent upon my failure to return.

44th int. Look at the paper now shown you, hereto annexed, marked "Exhibit A," and state who wrote the same, if you know, and whether or not it was sent to the 1st National Bank with the securities sent by M'r Wood on the morning of the 26th of August.

EXHIBIT A.

Collateral to check of Homans & Co. on N. Y., August 25, $10,000.
B. HOMANS, J'R.

51 Ans. I wrote the paper marked "Exhibit A" and identified by my signature. I put it in one of the packages of securities; I believe in that for the 1st National Bank.

45th int. Look at the paper now shown you, and hereto attached, and marked "Exhibit B;" state who wrote it, if you know, and whether or not it was sent to the Merchants' Nat'l Bank with the securities sent to it by M'r Wood on the morning of the 26th of August.

EXHIBIT B.

HOMANS & CO., BANKERS,
No. 23 WEST THIRD STREET,
Cincinnati, Aug. 25, 1869.

D. J. FALLIS, E'r, Pr.:

D'R SIR: A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security.

B. HOMANS, J'R.

Exhibit B, R. T.

Ans. I wrote the paper myself, and it was put in the package that was sent to the Merchants' Nat'l Bank.

46th int. At the time you sent these securities to the Merchants' and 1st Nat'l Banks, did either of those banks, or any of their officers,
52 so far as you know, know, believe, or suspect, or have any reason, so far as you know, to know, believe, or suspect, that Homans & Co. were about to suspend payment, or were in danger of it?

Ans. None, so far as I know, or have any reason to believe.

47th int. Explain fully your reasons for sending to them these collaterals. State why you handed them to them rather than to any other of your creditors.

Ans. Inasmuch as I had gone to them and offered to sell them our check on New York, unsolicited by them, and taken by them in perfect good faith and without hesitation, I felt in honor bound to protect those checks.

48th int. At the time you sent these collaterals to the banks above named, what was your own belief as to your ultimate solvency?

Ans. I did not stop to make any estimate, but it was evident I could not pay in full.

49th int. When you say it was evident you could not pay in full, was that in reference to that presentation, or in future time?

Ans. Both, for my credit being gone, recuperation became impossible.

53 50th int. At the time you directed M'r Wood to deliver these collaterals to these banks, didn't you have a hope of obtaining help, by loan or otherwise, in Covington, Ky.?

Ans. At the time I left those papers in M'r Wood's hands, I did have such a hope, but my instructions were only to deliver them in the event of my failure to return by ten o'clock.

51st int. Did you return by 10 o'clock, or did you give him any future instructions about the delivery of those collaterals?

Ans. I did not return, and sent no further instructions as to the securities.

52nd int. At the time you directed these securities to be delivered to these banks, did you not believe that in drawing the checks to which these securities were by you placed as collateral on Aug. 26th, and obtaining money upon them, when you had in fact no funds with the Market Nat'l Bank of New York, rendered yourself liable to criminal prosecution?

Ans. I had always considered that the selling of a check to an inno-

cent party for which there was no funds ought to be considered a criminal offence.

54 Re-examination:

1. For what consideration were the several securities referred to in your answers to the 4th and 5th interrogatories-in-chief delivered to the said Merchants' and First National Bank'? If upon any other consideration than to secure the payment of the checks you had sold to them the day before, state fully what the same was.

Ans. There was no consideration whatever beyond the checks; there was no further communication on the subject at all.

B. HOMANS, J'R.

54½ Interrogatories to be propounded to Benjamin Homans, j'r.

Inter. 1. State what promise or agreement, if any, you made with the Merchants' National Bank, through its president, Daniel J. Fallis, relative to giving security or collaterals to your draft for $10,000, sold by you to said bank on 25th August, 1869. State fully the conversation.

Inter. 2. State whether or not the collaterals were sent by you to the Merchants' National Bank to secure your draft for $10,000, sold to them on the previous day, in pursuance of any promise or agreement. If not, give your reasons for sending the same.

Inter. 3d. State whether or not you had any conversation with said Fallis on the day which you sold the draft to the Merchants' National Bank relative to negotiating a call loan with said bank. If yea, state what was said as to the deposit of collaterals by you to secure said loan.

55 Inter. 4th. State whether or not you had frequently, prior to the 25th day of August, sold your sight exchange on New York to the Merchants' National Bank for currency. If yea, state what security you gave them in addition to your draft.

Inter. 5th. If, in answer to question 4th, you state that you never gave any security to the Merchants' National Bank when selling them your sight-exchange on New York, explain how you came to send them on the 25th day of August collaterals to secure the payment of your $10,000 draft sold them on the previous day. If in pursuance to an arrangement, state the agreement fully.

Inter. 6th. State what, if anything, you ever said to Daniel J. Fallis relative to having a confidential friend in New York who had agreed to protect your drafts; and, if you answer that you ever said anything on this subject to him, state whether the conversation was before or after your failure.

HOADLY & JOHNSON,
Sol's for Complainants.

55½ Cross-interrogatories to be answered by M'r Homans.

B. HOMANS, J'R.

Ques. 1. State, if you can recollect, at or about what time of day it was, on August 25, 1869, that you sold to the Merchants' National Bank your sight-draft on New York for $10,000.

Ques. 2. With whom was the negotiation made, and what conversation, if any, took place, at the time or previous to it, with reference to the transaction?

I believe in that

Ques. 3. Was the draft drawn against a cash balance in your favor; if not, what arrangement had you for its protection and payment?

Ques. 4. What was the state of your account with the Market National Bank, your New York correspondent, on that date? Please obtain and file a copy of that account as it stood on that date, from the date of its last previous balance.

Ques. 5. Was the draft you sold on that day drawn for the purpose of transferring cash funds then held by you in New York to Cin-
56 cinnati, for current use here, in the ordinary and usual course of banking business, or was it sold for the purpose of raising money to meet an emergency of business?

Ques. 6. When did you first learn, after the sale of the draft, that it might not be paid, from whom and how, and what was the communication?

Ques. 7. Had you at any time, previous to the sale of the draft in question, informed M'r Fallis, of the Merchants' National Bank, that you habitually or occasionally drew sight-drafts, not against cash balances, but upon a credit in New York; if so, when and under what circumstances, and what, if anything, did you say to him in reference to making good any such drafts purchased, or that might be purchased by him?

Ques. 8. On the morning of August 25th, 1869, in pass' way near the cashier's room door of the Merchants' National Bank, did you not say to M'r Fallis that you considered it dishonorable, if not criminal, to draw checks without having the funds in drawee's hands, and that your exchange on New York should always be protected by a friend in New York in a case of overdraft, or by collaterals in case of any
57 probabilities arising that your drafts would not be paid?

Ques. 9. On August 25, 1869, were there any clearing-house checks upon you unpaid, that had been held over from a previous day, at or without your request; if so, who held them, and what was the amount of them, and did you have any conversation with M'r Fallis on that day in relation to them? If so, state what it was.

Ques. 10. State whether, previous to this transaction, you had dealings with the Merchants' National Bank, in the purchase and sale of New York exchange, or otherwise; state whether in case of temporary accommodations from that bank to you, by way of call-loan, if any such took place, you had been in the habit of making deposits of collateral security; and also whether you had ever previously obtained from that bank an accommodation in the purchase of your sight-drafts on New York, as the form of a temporary loan; and, if so, what understanding there was, if any, between you, in reference to its being made secure.

MATTHEWS, RAMSEY & MATTHEWS,
Sol'rs for Def'ts.

58 In answer to interrogatory 1st. At the time of negotiating with the Merchants' National Bank for the sale to them of Homans & Co.'s draft for $10,000 on 25th August, 1869, I made no promise or agreement to give security or collaterals to secure its payment. I do not remember any conversation on the subject.

In answer to interrogatory 2nd. The collaterals sent by me to Merchants' National Bank to secure the draft for $10,000 above mentioned were not so sent because of any special, explicit, or particular promise to send them. They were so sent because I deemed it only honest to do so, inasmuch as the bank took the draft with the understanding that funds were in the New York bank to meet it, as I supposed when

cent party for which there was no funds ought to be considered a criminal offence.

54 Re-examination:

1. For what consideration were the several securities referred to in your answers to the 4th and 5th interrogatories-in-chief delivered to the said Merchants' and First National Bank'? If upon any other consideration than to secure the payment of the checks you had sold to them the day before, state fully what the same was.

Ans. There was no consideration whatever beyond the checks; there was no further communication on the subject at all.

B. HOMANS, J'R.

54½ Interrogatories to be propounded to Benjamin Homans, j'r.

Inter. 1. State what promise or agreement, if any, you made with the Merchants' National Bank, through its president, Daniel J. Fallis, relative to giving security or collaterals to your draft for $10,000, sold by you to said bank on 25th August, 1869. State fully the conversation.

Inter. 2. State whether or not the collaterals were sent by you to the Merchants' National Bank to secure your draft for $10,000, sold to them on the previous day, in pursuance of any promise or agreement. If not, give your reasons for sending the same.

Inter. 3d. State whether or not you had any conversation with said Fallis on the day which you sold the draft to the Merchants' National Bank relative to negotiating a call loan with said bank. If yea, state what was said as to the deposit of collaterals by you to secure said loan.

55 Inter. 4th. State whether or not you had frequently, prior to the 25th day of August, sold your sight exchange on New York to the Merchants' National Bank for currency. If yea, state what security you gave them in addition to your draft.

Inter. 5th. If, in answer to question 4th, you state that you never gave any security to the Merchants' National Bank when selling them your sight-exchange on New York, explain how you came to send them on the 25th day of August collaterals to secure the payment of your $10,000 draft sold them on the previous day. If in pursuance to an arrangement, state the agreement fully.

Inter. 6th. State what, if anything, you ever said to Daniel J. Fallis relative to having a confidential friend in New York who had agreed to protect your drafts; and, if you answer that you ever said anything on this subject to him, state whether the conversation was before or after your failure.

HOADLY & JOHNSON,
Sol's for Complainants.

55½ Cross-interrogatories to be answered by M'r Homans.

B. HOMANS, J'R.

Ques. 1. State, if you can recollect, at or about what time of day it was, on August 25, 1869, that you sold to the Merchants' National Bank your sight-draft on New York for $10,000.

Ques. 2. With whom was the negotiation made, and what conversation, if any, took place, at the time or previous to it, with reference to the transaction?

I believe in that

Ques. 3. Was the draft drawn against a cash balance in your favor; if not, what arrangement had you for its protection and payment?

Ques. 4. What was the state of your account with the Market National Bank, your New York correspondent, on that date? Please obtain and file a copy of that account as it stood on that date, from the date of its last previous balance.

Ques. 5. Was the draft you sold on that day drawn for the purpose of transferring cash funds then held by you in New York to Cin-
56 cinnati, for current use here, in the ordinary and usual course of banking business, or was it sold for the purpose of raising money to meet an emergency of business?

Ques. 6. When did you first learn, after the sale of the draft, that it might not be paid, from whom and how, and what was the communication?

Ques. 7. Had you at any time, previous to the sale of the draft in question, informed M'r Fallis, of the Merchants' National Bank, that you habitually or occasionally drew sight-drafts, not against cash balances, but upon a credit in New York; if so, when and under what circumstances, and what, if anything, did you say to him in reference to making good any such drafts purchased, or that might be purchased by him?

Ques. 8. On the morning of August 25th, 1869, in pass' way near the cashier's room door of the Merchants' National Bank, did you not say to M'r Fallis that you considered it dishonorable, if not criminal, to draw checks without having the funds in drawee's hands, and that your exchange on New York should always be protected by a friend in New York in a case of overdraft, or by collaterals in case of any
57 probabilities arising that your drafts would not be paid?

Ques. 9. On August 25, 1869, were there any clearing-house checks upon you unpaid, that had been held over from a previous day, at or without your request; if so, who held them, and what was the amount of them, and did you have any conversation with M'r Fallis on that day in relation to them? If so, state what it was.

Ques. 10. State whether, previous to this transaction, you had dealings with the Merchants' National Bank, in the purchase and sale of New York exchange, or otherwise; state whether in case of temporary accommodations from that bank to you, by way of call-loan, if any such took place, you had been in the habit of making deposits of collateral security; and also whether you had ever previously obtained from that bank an accommodation in the purchase of your sight-drafts on New York, as the form of a temporary loan; and, if so, what understanding there was, if any, between you, in reference to its being made secure.

MATTHEWS, RAMSEY & MATTHEWS,
Sol'rs for Def'ts.

58 In answer to interrogatory 1st. At the time of negotiating with the Merchants' National Bank for the sale to them of Homans & Co.'s draft for $10,000 on 25th August, 1869, I made no promise or agreement to give security or collaterals to secure its payment. I do not remember any conversation on the subject.

In answer to interrogatory 2nd. The collaterals sent by me to Merchants' National Bank to secure the draft for $10,000 above mentioned were not so sent because of any special, explicit, or particular promise to send them. They were so sent because I deemed it only honest to do so, inasmuch as the bank took the draft with the understanding that funds were in the New York bank to meet it, as I supposed when

it was given that they would be. Furthermore, I deemed it my duty to send the collaterals because I had always been accustomed to regard the issuing of a check as good when there were in fact no funds to meet it as little short of a criminal offence; and I had no desire to stand unjustly in such a position.

59 In answer to interrogatory 3d. In regard to any conversation with Mr. Fallis, on the day upon which I sold to the Merchants' National Bank the $10,000 draft aforesaid, relative to negotiating with them a call-loan, I cannot at this time state whether such conversation did or did not occur on that day. But inasmuch as I have frequently had such transactions with that bank, and needed such a loan at the time, it is entirely probable that such a conversation may have occurred then. For any call-loan I was in the habit of giving the bank collateral securities.

In answer to interrogatory 4th. I had frequently prior to the 25th of August, 1869, sold my sight-exchange on New York to the Merchants' National Bank for currency. I had never given them any security therefor.

In answer to interrogatory 5th. I have already replied fully in my answer to inter. 2nd.

In answer to interrogatory 6th. I did mention to M'r D. J. Fallis that I had a confidential friend in New York upon whom I relied to protect my drafts in any emergency; but I am positive that I could not have so told him until after my failure. It is, however, possible that in some previous conversation upon the subject of a call-loan that I may have stated that upon any sudden call of such a loan I could depend upon outside resources in New York to meet it. I say this is possible, but I have no recollection of such statement prior to Aug. 27th, 1869.

60 In answer to cross-interrogatories, ques. 1. My impression is that the hour at which I sold to the Merchants' National Bank, on August 25, 1869, my draft for $10,000 was immediately after the opening of business, or 9 o'clock a. m.

In answer to question 2. Without a positive recollection, I think the negotiation was made with Mr. Fallis, the president of the bank. I do not remember that any conversation ensued, further than the usual agreement as to the rate of exchange on New York, and the mode of payment, whether in currency or in a memorandum check to go through the clearing-house.

In answer to question 3rd. I supposed that the draft would be paid by the New York bank on which it was drawn. If the account should be overdrawn by the payment of the draft, they would notify the confidential friend upon whom I depended to make good any temporary deficiency. But from the nature of my business at that time, I was receiving more eastern exchange than I could use in the ordinary course, and therefore could draw with confidence round sums as occasion

61 might demand. (See also reply to ques. 4.)

In answer to question 4. The condition of my account with the Market National Bank is shown by my books in the hands of trustees of my estate at Cincinnati, except that I have no means of obtaining a copy of the account. I will state, further, that that bank was in the habit of paying my drafts, even if they should overdraw the account to the amount of $10,000 or $20,000 temporarily, sometimes for larger amounts.

In answer to question 5. The draft for $10,000 sold to Merchants' National Bank on 25th August, 1869, was sold on anticipation of cash funds, which I expected to be placed to my credit in New York, but it was so sold for the purpose of raising money to meet an emergency in business.

In answer to question 6. In the evening of the same day, August 25th, I learned that I could not depend upon the return demanded of advances made by me for the Southern Ohio Coal Company, of which I was
62 the treasurer. I learned this from Nathan T. Johnson, of New Jersey, (in behalf of the company,) who had arrived on that day, in a response to a summons from me.

In answer to question 7. As I have already stated in reply to inter. 6th, I had not at any time, previous to the sale of the $10,000 draft, informed M'r Fallis that I habitually or occasionally drew sight-drafts against only a credit in New York. Such a statement was not made till afterwards, and in explanation why I had drawn the draft sold him, which was not paid

In answer to question 8. I have not the slightest recollection of making on the 25th August, 1869, such a statement to M'r Fallis, and do not hesitate to say that I did not then make it.

In answer to question 9. It was not customary to present clearing-house checks until the morning following the day upon which they were issued. There were such checks upon me on August 25th, held over as usual from the afternoon of the day previous. I do not remem-
63 ber any conversation in regard to them, but in selling to M'r Fallis the draft in question, it would have been very usual to mention that I was debtor to the clearing-house, and wanted currency to settle with them. I cannot say who held those checks, or what was their amount, but it was over $30,000.

In answer to question 10. I had such transactions from time to time. If call-loans, I always gave the bank collateral securities. I had never, to the best of my knowledge, obtained from them an accommodation in the purchase of my draft on New York as the fo'm of a temporary loan.

B. HOMANS, J'R.

64 THEO. COOK.

And the said Theodore Cook, of lawful age, having been first solemnly sworn according to law, afterwards deposed and said as follows, in answer to interrogatories and cross-interrogatories:

Direct examination:

1. Int'y. State your name, age, residence, and occupation.

Ans. My name is Theodore Cook; age is 41 years; residence is Cincinnati, and am president of the 4th National Bank of Cincinnati.

2. Int'y. How long have you been engaged in the banking business in Cincinnati?

Ans. I have been in the banking business about five years as president of the 4th National Bank.

3. Int'y. State what you know, if anything, concerning the custom, if any such there be, existing between solvent banks and bankers in the city of Cincinnati, by which said banks or bankers dispose among
65 themselves, or to other banks or bankers, of sight-drafts on New York, and accompanying the sale with collaterals, securing the payment of the drafts.

Ans. There is no such custom. I have never heard or known of any such thing. The very fact of giving, or offering to give, such collateral would be a taint upon the standing of the bank or banker giving, or offering to give, such collateral in the sale of sight exchange.

4. Int'y. Suppose a banker having sold you a sight-draft on New York should, on the day after such sale, without any agreement or

solicitation upon your part, send you collaterals to secure said sight-draft, accompanied by a note stating that he was fearful that said sight-draft would not be good on presentation, would such a transaction be in the usual and ordinary course of business; &, if not, what business conclusion would you draw from such a transaction as to the banker's solvency?

(Objected to as incompetent by counsel for defendants.)

Ans. Such a transaction is wholly unusual among solvent bankers, and it would at once impress me with the idea that he was insolvent, or in great financial difficulty. A man might be in great financial difficulties and still not be inselvent.

66 Cross-examination:

1. Int'y. State whether bankers in Cincinnati, in drawing sight-drafts on New York, always draw against cash balance in their favor in the hands of their correspondent, or whether it does not sometimes happen that they are accustomed to draw under a previous arrangement with their correspondents for credit, in case their account is overdrawn?

Ans. In regard to banks, I think it is a universal custom to draw only against cash balances. I have never known any other custom or usage among banks. In regard to private bankers, I do not know but they have a different arrangement, but I don't know as they do. I never knew of any deviation from this rule in the case of private bankers.

2. Int'y. State whether or not it does not sometimes happen with banks or bankers in Cincinnati to make temporary loans to meet the exigencies of current business?

Ans. I think it does happen that such transactions have been made, but of my own personal knowledge I don't know of any such
67 transaction. I think that I remember instances in which parties have asked us to hold their clearing-house clecks for a day or two, and we have done so, and perhaps we have asked the same accommodation ourselves when currency was scarce.

THEO. COOK.

EDWARD ALBERT.

And the said Edward Albert, of lawful age, having been first solemnly sworn according to law, afterwards deposed and said as follows:

Direct examination:

1. Int'y. State your name, age, residence, and occupation.

Ans. My name is Edward Albert; age is 23 years; residence, Cincinnati, and am book-keeper of the 4th National Bank of Cincinnati.

2. Int'y. State how you were employed in the year 1869, up to the time of the failure of Homans & Co.

Ans. I was clerk with Homans & Co., bankers.

3. Int'y. State what you know, if anything, concerning the de-
68 livery of an envelope containing securities to the Merchants' National Bank. State the date and hour of the day, by whom and to whom delivered, and all you know concerning the same.

Ans. On the 26th of August, 1869, about half past ten o'clock, I think, ten or half past ten, I received word from Mr. Homans to close the doors and take no more deposits and pay no more checks. Then Mr. Wood, the book-keeper for Homans & Co., informed me that Mr. Homans had left word with him to deliver two envelopes, one addressed to the 1st Nat'l Bank of Cincinnati and one to the Merchants' National Bank of Cincinnati. The envelopes contained notes belonging to Ho-

mans & Co. Before delivering these, I locked the bank-doors—the front doors of Homans & Co.—and then delivered the package addressed to the 1st National Bank to Mr. Forbes, I think, but am not positive; and then delivered the package addressed to the Merchants' National Bank. I don't recollect whom that was given to. This was about half-past ten o'clock.

4. Int'y. Who opened the vault in the morning of August 26, 1869; at what time was it opened, and where were the securities that were afterwards placed in the envelopes?

69 Ans. The vault was opened about half past eight o'clock by myself; and the safe where the money and securities were placed was opened either by me or Mr. Homans at 9 o'clock. The securities were in the pocket-book with other securities and collections. The pocket-book was in the safe.

5. Int'y. State whether the bank was opened for business on the 26th of August, 1869; and, if so, at what time and for how long a time was the bank open.

Ans. The bank was open at the usual hour, 9 o'clock in the morning, and was open for business till ten o'clock or after on that day.

6. Int'y. State whether or not the bank had closed and suspended business before the securities were delivered to the Merchants' National Bank.

Ans. The bank had suspended payment and the doors were closed before the securities were delivered to the Merchants' National Bank.

7. Int'y. State whether or not Mr. Homans was at the bank on the morning of the 26th of August, 1869; and, if so, how long did he remain, when did he go away, and what, if any, instructions did he give concerning the delivery of the securities to the Merchants' Nat'l Bank?

70 Ans. Mr. Homans was at the bank on the morning of the 26th of August. He remained there about an hour, and went away about half past nine o'clock in the morning. He gave no instructions to me about the delivery of the securities. He did not return again to the bank on the 26th of August. Mr. Wood instructed me, after Homans had gone away and we had received notice from him to close the bank, to deliver the securities as above stated.

Cross-examination:

1. Int'y. State whether or not, after receiving the message from Mr. Homans on the morning of the 26th of August to close the bank, you actually refused payment to any person of any check or other obligation before closing the door.

Ans. Yes; we did. I refused it. One, I think, was M'r Fry, of the 1st Nat'l Bank of Covington, and another was Mr. Yergason, cashier of the Merchants' Nat'l Bank. I think the latter was after the doors were closed, and after the envelope was delivered to the Merchants' Nat'l Bank.

2. Int'y. State what it was you refused payment of to M'r Yergason.

71 Ans. A clearing-house check. Don't remember the amount. I think it was a clearing-house check of the 25th of August. Those check' were not presented until the next day after they were given and dated.

3. Int'y. State whether or not your refusal to pay the clearing-house check to M'r Yergason was, as far as you know, the first knowledge, on his part, of the suspension of Homans & Co.

solicitation upon your part, send you collaterals to secure said sight-draft, accompanied by a note stating that he was fearful that said sight-draft would not be good on presentation, would such a transaction be in the usual and ordinary course of business; &, if not, what business conclusion would you draw from such a transaction as to the banker's solvency?

(Objected to as incompetent by counsel for defendants.)

Ans. Such a transaction is wholly unusual among solvent bankers, and it would at once impress me with the idea that he was insolvent, or in great financial difficulty. A man might be in great financial difficulties and still not be inselvent.

66 Cross-examination:

1. Int'y. State whether bankers in Cincinnati, in drawing sight-drafts on New York, always draw against cash balance in their favor in the hands of their correspondent, or whether it does not sometimes happen that they are accustomed to draw under a previous arrangement with their correspondents for credit, in case their account is overdrawn?

Ans. In regard to banks, I think it is a universal custom to draw only against cash balances. I have never known any other custom or usage among banks. In regard to private bankers, I do not know but they have a different arrangement, but I don't know as they do. I never knew of any deviation from this rule in the case of private bankers.

2. Int'y. State whether or not it does not sometimes happen with banks or bankers in Cincinnati to make temporary loans to meet the exigencies of current business?

Ans. I think it does happen that such transactions have been made, but of my own personal knowledge I don't know of any such
67 transaction. I think that I remember instances in which parties have asked us to hold their clearing-house checks for a day or two, and we have done so, and perhaps we have asked the same accommodation ourselves when currency was scarce.

THEO. COOK.

EDWARD ALBERT.

And the said Edward Albert, of lawful age, having been first solemnly sworn according to law, afterwards deposed and said as follows:

Direct examination:

1. Int'y. State your name, age, residence, and occupation.

Ans. My name is Edward Albert; age is 23 years; residence, Cincinnati, and am book-keeper of the 4th National Bank of Cincinnati.

2. Int'y. State how you were employed in the year 1869, up to the time of the failure of Homans & Co.

Ans. I was clerk with Homans & Co., bankers.

3. Int'y. State what you know, if anything, concerning the de-
68 livery of an envelope containing securities to the Merchants' National Bank. State the date and hour of the day, by whom and to whom delivered, and all you know concerning the same.

Ans. On the 26th of August, 1869, about half past ten o'clock, I think, ten or half past ten, I received word from Mr. Homans to close the doors and take no more deposits and pay no more checks. Then Mr. Wood, the book-keeper for Homans & Co., informed me that Mr. Homans had left word with him to deliver two envelopes, one addressed to the 1st Nat'l Bank of Cincinnati and one to the Merchants' National Bank of Cincinnati. The envelopes contained notes belonging to Ho-

mans & Co. Before delivering these, I locked the bank-doors—the front doors of Homans & Co.—and then delivered the package addressed to the 1st National Bank to Mr. Forbes, I think, but am not positive; and then delivered the package addressed to the Merchants' National Bank. I don't recollect whom that was given to. This was about half-past ten o'clock.

4. Int'y. Who opened the vault in the morning of August 26, 1869; at what time was it opened, and where were the securities that were afterwards placed in the envelopes?

69 Ans. The vault was opened about half past eight o'clock by myself; and the safe where the money and securities were placed was opened either by me or Mr. Homans at 9 o'clock. The securities were in the pocket-book with other securities and collections. The pocket-book was in the safe.

5. Int'y. State whether the bank was opened for business on the 26th of August, 1869; and, if so, at what time and for how long a time was the bank open.

Ans. The bank was open at the usual hour, 9 o'clock in the morning, and was open for business till ten o'clock or after on that day.

6. Int'y. State whether or not the bank had closed and suspended business before the securities were delivered to the Merchants' National Bank.

Ans. The bank had suspended payment and the doors were closed before the securities were delivered to the Merchants' National Bank.

7. Int'y. State whether or not Mr. Homans was at the bank on the morning of the 26th of August, 1869; and, if so, how long did he remain, when did he go away, and what, if any, instructions did he give concerning the delivery of the securities to the Merchants' Nat'l Bank?

70 Ans. Mr. Homans was at the bank on the morning of the 26th of August. He remained there about an hour, and went away about half past nine o'clock in the morning. He gave no instructions to me about the delivery of the securities. He did not return again to the bank on the 26th of August. Mr. Wood instructed me, after Homans had gone away and we had received notice from him to close the bank, to deliver the securities as above stated.

Cross-examination:

1. Int'y. State whether or not, after receiving the message from Mr. Homans on the morning of the 26th of August to close the bank, you actually refused payment to any person of any check or other obligation before closing the door.

Ans. Yes; we did. I refused it. One, I think, was M'r Fry, of the 1st Nat'l Bank of Covington, and another was Mr. Yergason, cashier of the Merchants' Nat'l Bank. I think the latter was after the doors were closed, and after the envelope was delivered to the Merchants' Nat'l Bank.

2. Int'y. State what it was you refused payment of to M'r Yergason.

71 Ans. A clearing-house check. Don't remember the amount. I think it was a clearing-house check of the 25th of August. Those check' were not presented until the next day after they were given and dated.

3. Int'y. State whether or not your refusal to pay the clearing-house check to M'r Yergason was, as far as you know, the first knowledge, on his part, of the suspension of Homans & Co.

Ans. I don't think it was. Because, as far as I recollect, that bank was not in the habit of presenting clearing-house checks, and I don't think it would have been presented if I had not taken that envelope over there with the securities. I think it must have been about fifteen minutes after I had returned to the bank after delivering the securities when the clearing-house check was presented by M'r Yergason.

4. Int'y. State whether or not, after locking the front door of Homans & Co., you proceeded directly with the envelopes to the 1st National Bank, and from there directly to the Merchants' National Bank, and whether at either place you communication of Homans & Co.'s suspension.

Ans. After locking the door of Homans & Co., I went directly
72 to the 1st National Bank, from there I went to Andrews, Bissell Co., on the same square. I then crossed the street to the Merchants' National Bank. I don't recollect that I said anything at either place about the suspension of Homans & Co.

5. Int'y. What is the full name of the M'r Wood, refer'ed to by you as the book-keeper of Homans & Co., and where does he reside?

Ans. His name is B. F. Wood, and his residence was Evansville, Indiana, the last I knew.

6. Int'y. State what, if any, statement was made to you, or in your hearing, by M'r Homans on the morning of the 26th of August, 1869, at or prior to his leaving the office to go to Covington, as to his purpose in doing so.

Ans. I don't remember how I received the impression, but I got the impression in some way, at the time he went over there to sell some exchange.

7. Int'y. Can you state more definitely how you could at the time have received such an impression otherwise than from some statement or expression of M'r Homans?

Ans. I don't know. But he was in the habit of pay' clearing-
73 house checks by selling exchange. He told me he was going over to Covington, but I don't remember whether he said anything to me about selling exchange.

8. Int'y. By whom, and when, were the securities placed in the envelopes, and the packages addressed which were delivered by you to the 1st National Bank and Merch. Nat'l Bank, on the morning of the 20th of August?

Ans. I don't know who placed the securities in the envelopes. The packages were addressed by M'r Homans. The securities were placed in the envelopes some time after the bank was opened, but I can't say when, as I didn't see it done.

9. Int'y. Might it not have been done the afternoon previous?

Ans. I think it could not have been done the afternoon before, without my knowing it, because I have charge of them and of placing them in the safe at night.

10. Int'y. Were they not in the envelopes in the safe, already addressed, when you opened the safe on the morning of the 26th of August?

Ans. I didn't find them addressed in the safe in the morning when I opened the safe.

74 11. Int'y. How did you find them?

Ans. I found the pocket-book in which we kept the securities and collections in the safe in the usual place, and I think the securities must have been in the pocket-book. M'r Homans was not in the habit of taking any paper out without leaving some memorandum or saying something to me about it.

12. Int'y. Who handed you the packages that morning?

Ans. I don't know as any one handed me the packages. If any one did it was M'r Wood. He might have told me where they were, and I took them then.

13. Int'y. Where did you get them from?

Ans. I just told you I don't remember whether Mr. Wood handed them to me or told me where they were, and I don't remember where I got them from.

14 Int'y. Were they sealed and addressed when you first saw and received them?

Ans. They were not sealed, but addressed.

15. Int'y. Did you examine and read the contents?

75 Ans. I did.

16. Int'y. Did you then seal them?

Ans. I did not.

17. Int'y. Did you make any memorandum or entry in the books of Homans & Co. of the transaction?

Ans. I did not, for I saw that Mr. Wood had already taken a list of the notes and amounts; I did not think it necessary to make another.

18. Int'y. In the envelope addressed to the Merchants' Nat'l Bank, was there anything besides the securities?

Ans. There was a memorandum of the notes and amounts.

19. Int'y. Was there or not a note in writing from M'r Homans to M'r Fallis?

Ans. I don't think there was. If there was, I think I should have seen it.

20. Int'y. Who gave you directions as to the delivery of these envelopes?

Ans. Mr. Wood.

21. Int'y. What directions were given?

76 Ans. To leave them at the banks to which they were addressed.

22. Int'y. At what hour, if you remember, did M'r Homans leave the bank on the afternoon of the 25 of Aug., 1869?

Ans. I don't recollect. I think it was between 4 and 5 o'clock. He was in the habit of leaving about that time.

23. Int'y. Do you remember any person whom you met or saw in the Merchants' Nat'l Bank connected with the bank when you delivered the envelope?

Ans. I do not.

24. Int'y. In what room was the delivery made?

Ans. I think it was made at the center of the receiving-teller's desk, but I am not positive.

EDWARD ALBERT.

G. P. GRIFFITHS.

And the said Griffith P. Griffiths, of lawful age, being first solemnly sworn according to law, deposed and said as follows:

Direct examination:

1. State your name, residence, and occupation.

Ans. My name is Griffith P. Griffiths; residence in Cincinnati,
77 O.; and am cashier of the Third National Bank of Cincinnati, and have been so engaged for seven years. Have been in the banking business for 18 years.

2. State what you know, if anything, concerning the custom, if any

such there be, existing between solvent banks and bankers in the city of Cincinnati, by which said banks and bankers dispose among themselves, or to other banks or bankers, of sight-drafts on New York, and accompany the sale with collaterals, securing the payment of the draft.

Ans. I never knew of such custom. I have been employed in three banks in Cincinnati—the Bank of the Ohio Valley, the 1st National Bank, and the 3rd National Bank, and never heard of any such custom.

4. Suppose a banker, having sold you a sight-draft on New York, should, on the day after such sale, without any agreement or solicitation upon your part, send you collaterals to secure said sight-draft, accompanied by a note stating that he was fearful that said sight-draft would not be good on *re*presentation, would such a transaction be in the ordinary course of banking business; and, if not, what business conclusion would you draw from such a transaction as to the banker's solvency?

78 Ans. Such a transaction would be very unusual, and out of the ordinary course of banking business; and I would suppose I had bought exchange that would not be paid, and that the credit of such banker was in jeopardy, in the case supposed in the question.

Cross-examination:

1. Would you not suppose that the drawor of the draft was endeavoring to prevent injury to his credit by depositing security?

Ans. No; for the draft would be drawn on New York, and it would be presented and protested there if not paid; and to accomplish the protection of his credit the security should be given there. If the security were given here I should think it was to protect the draft here when it should be returned protested from New York.

2. Are not the banks with which you have been connected banks of large capital and large credit?

Ans. Yes, sir.

3. Is it unusual for an individual or individuals not bankers to
79 give security for the payment of drafts drawn on New York or elsewhere?

Ans. No; it is not unusual, but it is not the ordinary course of business.

4. Was not the firm of Homans & Co. composed of a single individual, and was it not known to the bank or bankers in this city that he possessed small capital?

Ans. I did not know that the firm of Homans & Co. was composed of a single individual until after the failure. I cannot speak for any one but myself. I did not know the amount of the capital of Homans & Co., but supposed it to be as much as a hundred thousand dollars.

5. Might not a solvent banker draw upon New York, and the draft remain unpaid after presentation, by reason of the failure of the drawee, or other circumstances?

Ans. Upon the failure of the drawee, the draft of a solvent banker might not be paid on presentation. By miscarriage of receipt, such a thing might occur, but would be receipted by telegraph.

80 6. State whether your bank has any interest in this suit; and, if so, what.

Ans. Our bank is one of the creditors of Homans & Co., but I have no personal interest in the matter.

GRIFFITH P. GRIFFITHS.

JAMES ESPY.

And the said James Espy, of lawful age, being first solemnly sworn according to law, afterwards deposed and said as follows:

Direct examination:

1. State your name, residence, and occupation.

Ans. My name is James Espy; residence is Cincinnati, and am a banker, one of the firm of Espy, Heidlebach & Co. I have been in the banking business about 30 years.

2. State what you know, if anything, concerning the custom, if any such there be, existing between solvent banks and bankers in the city of Cincinnati, by which said banks or bankers dispose among themselves, or to other banks or bankers, of sight-drafts on New York, and accompany the sale with collaterals securing the payment of the draft.

Ans. It is not customary. I don't know of any such custom among bankers.

81 3. Suppose a banker, having sold you a sight-draft on New York, should, on the day after such sale, without any agreement or solicitation upon your part, send you collaterals to secure said sight-draft, accompanied by a note stating that he was fearful that said sight-draft would not be good on presentation, would such a transaction be in the usual or ordinary course of banking business; and, if not, what business conclusion would you draw from such a transaction as to the banker's solvency?

Ans. Such a transaction would be unusual, and out of the ordinary course of banking business. I should think that the banker was in a precarious condition to do such a thing.

Cross-examination:

1. Would you not suppose that the drawer of the draft was endeavoring to prevent injury to his credit by depositing security?

Ans. It would look to me as if he was intending to secure a part of his creditors. It would look to me as if he was broke and wished to protect a part of his creditors.

2. Are not the banks with which you have been connected banks of large capital and large credit?

82 Ans. Yes, sir.

3. Is it unusual for an individual or individuals, not bankers, to give security for the payment of drafts drawn on New York, or elsewhere?

Ans. It is very frequently done.

4. Was not the firm of Homans & Co. composed of a single individual, and was it not known by the banks and bankers in this city that he possessed small capital?

Ans. Yes; our bank would not have bought his drafts for some time before his failure.

5. Might not a solvent banker draw upon New York and the draft remain unpaid after presentation, by reason of the failure of the drawee, or other circumstances?

Ans. Yes, sir; it might.

6. State whether your bank has any interest in the suit; and, if so, what.

Ans. It has none.

JAS. ESPY.

83 *Respondents' testimony.*

D. J. FALLIS.

D. J. Fallis, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and saith as follows, viz:

Ques. 1. Please state your name, age, residence, and occupation.

Ans. D. J. Fallis; age, 63 years; residence, Covington, K'y; occupation, president of Merchants' National Bank, one of the defendants in this action, and have held this position since its organization in 1865.

Q. 2. Were you acquainted with Benjamin Homans, the other defendant in this suit? if so, state in what business, prior to the 26th day of August, 1869, he was engaged; under what name, and at what place.

Ans. I was acquainted with him; he was engaged in the business of private banking under the firm of Homans & Co., in the city of Cincinnati.

Q. 3. Until that day what was and had been the credit and
84 standing in his business of Mr. Homans?

Ans. The firm had enjoyed excellent credit up to the 26th, but there were evidences a short time prior thereto of their needs of money, occasionally, not to such an extent, however, as to render them suspicious.

Q. 4. State whether, prior to that date, there had been a course of dealing between the Merchants' National Bank and Homans & Co. as bankers; if so, state how long it had continued, and what was its general nature and extent.

Ans. There had been a relation existing, he having for the space of from six to twelve months prior thereto applied for accommodations to the Merchants' National Bank for temporary loans, and to sell his exchange upon collateral security, apparently for temporary purposes and short periods; having great confidence in his moral character, these accommodations were always rendered very freely when demanded.

Ques. 5. State the fact as to the punctuality and promptness
85 of Homans & Co. during that period in meeting their engagements.

Ans. They always responded, even to the sharpest call for the call-loan, and having great confidence in their conscientiousness, their character was sustained at our institution from their promptness and apparent effort to do that which was exactly right.

Q. 6. State what was the general standing and credit of Homans & Co. during the same period in other institutions and in the city at large.

Ans. It was, without exception, so far as I ever heard it mentioned, very good.

Q. 7. On what bank in the city of New York did Homans & Co. usually draw sight-checks for sale in the city of Cincinnati?

Ans. To the best of my recollection he drew mainly, if not exclusively, on the Market National Bank.

Q. 8. Do you know what arrangements he had with that bank for the payment of his checks?

86 Ans. M'r Homans informed me that with that bank, or some party intimately connected therewith, or both, he had arrangements by which his checks were to be protected and paid.

(Answer objected to as hearsay.)

Q. 9. State whether this information was communicated to you by M'r Homans prior or subsequent to his suspension on the 26th of August, 1869.

Ans. It was communicated prior to and subsequently, both.

Q. 10. State what knowledge you have, if any personally, of the purchase by The Merchants' National Bank from M'r Homans on 25th August, 1869, of the check of Homans & Co. on the Market National Bank of New York, for ten thousand dollars.

Ans. M'r Homans applied to me in person, rather confidentially, either to get a call loan or sell some exchange, on Wednesday, the 25th of August, 1869, alleging they were very short in funds and desired to made a temporary arrangement, as he had frequently done, for
87 money to the amount of ten thousand dollars, at which time he alleged that in either case, whether upon call loan or exchange, it should be "all right," or "all made right," I don't remember; but right was about it, I know.

He also, at the same time, communicated to me, as chairman, as I thought, of the committee of management of the clearing-house, that there were either "checks to a large amount" or "a check" held by other banks which had been held for some days prior thereto and not collected, and this money that he then applied to me for was to fortify or prepare in the event of said check or checks being presented, which the holders had a right to do whenever they chose. I did not know at the time but that this was an exclusively confidential matter with The Merchants' National, neither did I become aware of the contrary until after the suspension. During the afternoon of that day, the 25th of August, that house sent in ten thousand dollars on New York check as above stated, about which having given directions thereto I knew nothing personally until the following morning, Thursday, August 26th, 1869, upon my arrival from my residence at my office, between 7 and
88 8 o'clock. I found upon the cashier's desk, my office being locked, directed to me, a note from Homans, inclosing collateral to secure such check of ten thousand dollars, which excited no apprehension or suspicion in my mind, as it was just what he had promised, and I did not know, having been out of the office the afternoon previous, but what it had already been done the previous day, inasmuch as the note bore the date of the transaction; neither had I the least suspicion or apprehension of the real circumstances in the case until after nine and between nine and ten o'clock in the morning of said 26th of August, when our paying-teller communicated to me that our clearing-house check on Homans & Co., received of the manager the afternoon previous, had been demanded and not paid, and even this, the non-payment of this clearing-house check, did not cause any great uneasiness for the moment, as I supposed he would send the money over, as is sometimes done among solvent bankers; but about and soon after our clearing-house check had been demanded and payment declined, M'r
89 Espy, of the firm of Espy, Heidelbach & Co., also one of the clearing-house managers, sent for me, and upon my going to his business place said that Homans was "broke" or "had suspended" "or closed," precise language not remembered; those three words; I don't remember which he used; and that Homans had left his office for home, as he supposed, in Covington. Even then, having so much confidence in M'r Homans, I was under the impression, and so communicated to M'r Espy, that my impression was that M'r Homans had gone to Covington to make arrangements to pay his clearing-house checks; but thought that under the circumstances we had grounds for calling the attention of the manager and have him take the necessary measures under the rules of the clearing-house, to protect the rights of others connected therewith.